

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,
Petitioner

v.

Gilbert A. Rhoades, Sr.,
Respondent

Docket No. 11-09WCPen

By: Phyllis Phillips, Esq.
Hearing Officer

For: Valerie Rickert
Acting Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on August 18, 2010
Record closed on September 18, 2010

APPEARANCES:

Rebecca Smith, Esq., for Petitioner
Gilbert Rhoades, Sr., *pro se*, Respondent

ISSUE PRESENTED:

What administrative penalty should be assessed against Respondent for his failure to maintain workers' compensation insurance covering his employees as required by 21 V.S.A. §687(a)?

EXHIBITS:

Joint Exhibit I: Parties' Joint Statement of Undisputed Facts

Petitioner's Exhibit 1: Payroll information, 2006-2009
Petitioner's Exhibit 2: Insurance policy information pages

FINDINGS OF FACT:

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on December 28, 2009.
2. Respondent has operated a number of unincorporated businesses in Milton, Vermont since 1993. These include ABC Metals & Recycling and Rhoades Salvage, both of which are involved in the scrap metal trade.

3. From July 1, 2006 through July 17, 2009 Respondent continuously employed one or more employees who were neither exempt nor excluded from workers' compensation insurance coverage. Respondent did not maintain workers' compensation insurance coverage for these employees during this time period.
4. The number and type of employees Respondent employed between July 2006 and July 2009 varied depending on his business needs. Some were laborers, some were clerical and administrative employees.
5. Respondent secured workers' compensation insurance coverage for his employees effective July 18, 2009. The policy was priced based on an estimated annual payroll of \$20,000. Of that amount, \$13,000 in payroll was estimated for employees engaged in handling the scrap metal itself, and \$7,000 was estimated for clerical and administrative employees.
6. As of July 18, 2009 the workers' compensation insurance premium rate for Respondent's scrap metal laborers was \$13.54 per \$100 of payroll. The rate for his clerical employees was \$.51 per \$100 of payroll. Applying those rates to the estimated payroll in each classification, the estimated annual premium for the policy year beginning July 18, 2009 was \$2,044.00.
7. In the context of Petitioner's investigation into whether Respondent had failed to maintain workers' compensation insurance coverage for his employees, Respondent produced a summary of his payroll records from July 2006 through September 2009. The summary indicated that Respondent's actual annual payroll for these years likely was higher than the \$20,000 estimated in conjunction with the coverage he secured in July 2009. However, it is impossible to discern from the summary the breakdown in payroll between wages paid to scrap metal laborers versus wages paid to clerical and administrative employees. Respondent testified at hearing that the percentage varied from year to year. He now anticipates that his actual payroll for the July 2009 policy year likely will be split 50/50 between scrap metal laborer wages and clerical wages.
8. Petitioner issued an Administrative Citation and Penalty to Respondent on December 28, 2009. The citation proposed a penalty of \$19,500 for Respondent's failure to maintain workers' compensation insurance from July 1, 2006 through July 17, 2009. Petitioner derived the proposed penalty by tripling what it calculated to be the approximate amount of premium Respondent would have paid had he maintained insurance during this time period. In making this calculation, Petitioner assumed that Respondent's premium would not have varied from the \$2,044.00 annual premium estimated in conjunction with the coverage he secured in July 2009.
9. Respondent seasonably contested the Administrative Citation and Penalty. Currently he is embroiled in litigation brought against him by, among others, the State of Vermont Agency of Natural Resources. At hearing he testified to his dire

financial straits over the past few years, brought about both by the cost of defending the various legal claims pending against him and by the faltering business climate for scrap metal.

CONCLUSIONS OF LAW:

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.
2. Prior to July 1, 2007 the statute provided that an employer who failed to comply with the requirements of §687 would be assessed an administrative penalty of not more than \$50.00 for each day of violation, to a maximum of \$5,000. 21 V.S.A. §692(a). The statute subsequently was amended to raise the penalty to not more than \$100 daily, with no maximum cap. *Id.* Applying these parameters to the current proceeding, the maximum penalty that could be imposed against Respondent is \$79,800.
3. An administrative penalty is mandatory in all instances in which an employer is determined to have violated the provisions of §687. *Workers' Compensation and Safety Division v. Darcy Hodgdon and Quick Fix Truck Parts, Inc.*, 171 Vt. 526, 529 (2000). Pursuant to Workers' Compensation Rule 45.5100, however, the Commissioner has discretion to reduce the amount of any penalty assessed if the employer demonstrates:
 - That failure to obtain or maintain insurance was inadvertent or the result of excusable neglect and was promptly corrected;
 - That the penalty amount exceeds the amount of any premium expenditures that would have been paid if a policy was properly obtained or maintained; or
 - That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.
4. As to the first factor, Respondent failed to produce any evidence to establish that his failure to maintain insurance during the period in question was either inadvertent or the result of excusable neglect. Having allowed his coverage to lapse for more than three years, furthermore, it cannot be said that he "promptly corrected" his violation. Respondent merits no special consideration on account of this factor, therefore.
5. Nor does the third factor engender any sympathy for Respondent's situation. The high premium rate charged for the scrap metal laborers Respondent employed is evidence of both the frequency and severity of injuries associated with that work.

6. What mitigating evidence there is goes to the second factor. It is impossible to discern from Respondent's payroll summary alone whether the annual premium he would have paid for the three years that he failed to maintain insurance was equivalent to the estimated premium he was charged for the July 2009 policy year. Even so, it is improbable that the premium savings he realized would have totaled three times that amount, which was the basis for Petitioner's proposed penalty. It is likely, therefore, that the penalty amount well exceeds the amount of premium Respondent would have paid had he properly maintained coverage.
7. Though the proposed penalty is substantially more than what Respondent would have paid in premium had he complied with the law, it is substantially less than the maximum allowable under the statute. Given the severe consequences that the employees of an uninsured employer face in the event of a work-related injury, any penalty assessed ought properly to act as both a punishment and a deterrent. The penalty proposed in this case accomplishes these objectives.
8. I conclude that the proposed penalty assessed against Respondent for his failure to maintain workers' compensation insurance covering his employees from July 1, 2006 through July 17, 2009 is appropriate.

ORDER:

The December 28, 2009 Administrative Citation and Penalty is sustained. Respondent shall pay to the Vermont Department of Labor monetary penalties in the amount of \$19,500.00.

DATED at Montpelier, Vermont this 15th day of November 2010.

Valerie Rickert
Acting Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.