Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-141

OCTOBER TERM, 2020

Workers' Compensation & Safety Division v. Michael Feiner d/b/a Vine Ripe Consulting & Creative Services* & Vine Ripe Greenhouse Construction, LLC*	} } } }	APPEALED FROM: Department of Labor DOCKET NO. 20/21-19WCPen

In the above-entitled cause, the Clerk will enter:

Employer appeals a decision of the Commissioner of Labor imposing fines against him and his company for failure to maintain workers' compensation insurance. We affirm.

The Commissioner made the following findings of fact based on the evidence presented at the hearing below. Employer Michael Feiner is a farmhand, freelance writer, website consultant, ski resort employee, and assembler of prefabricated greenhouses. In April 2016, employer began performing greenhouse assembly services with the help of several laborers. Employer's customers were mostly farmers. Employer always served as the primary contact with customers and negotiated prices with them. The prices typically consisted of hourly rates for each laborer engaged in an assembly project. Employer's customers supplied the greenhouse kits and some equipment, while employer supplied other necessary tools and equipment. Employer collected payment from the customers and distributed the funds to the laborers according to the agreed-upon hourly rates. Employer did not dispute that the laborers were employees, although he did not believe them to be employees before these proceedings began.

Prior to 2018, employer did not use any formal business entity or have a separate trade name to perform his greenhouse assembly work. He accounted for the work under an existing trade name, Vine Ripe Consulting and Creative Services, which he had originally registered for his freelance writing and website-design work. Employer tracked his employees' hours on a spreadsheet that listed each employee's name, the date on which his work was completed, the number of hours worked, and the wages he was paid. The spreadsheet showed that employer paid $1654 to four employees in 2016, $7983 to three employees in 2017, and $15,275 to two employees in 2018.

In December 2018, employer formed Vine Ripe Greenhouse Construction, LLC (VRGC), a Vermont limited liability company of which he is the sole owner and principal. From then on, employer performed his greenhouse assembly work exclusively through VRGC. VRGC did not perform any work or have any employees until March 2019. VRGC did not initially procure workers' compensation insurance because employer was not aware that it was required.

In April 2019, the Workers' Compensation and Safety Division of the Department of Labor began an investigation into whether employer and VRGC had been operating without workers'

compensation insurance. Immediately after the investigation began, VRGC purchased a policy through the normal assigned risk market with an annual premium of $1204. In August 2019, the Department issued administrative citations proposing penalties of $47,200 against employer and $1750 against VRGC. Employer and VRGC timely appealed the citations to the Commissioner.

The Commissioner found that employer and VRGC were required to maintain insurance for their employees but failed to do so until April 2019. The Commissioner found that employer operated without workers' compensation insurance for a total of 944 days from April 2016 to November 2018, and that by failing to procure insurance during that time employer avoided paying approximately $3369.88 in premiums. He found that VRGC operated without workers' compensation insurance for a total of thirty-five days from March to April 2019 and avoided paying approximately $115.15 in premiums.

The Commissioner acknowledged employer's testimony that his work was inherently seasonal, with most jobs occurring between April and November. However, employer also testified that he occasionally performed jobs during the winter if the weather cooperated. The Commissioner therefore concluded that employer was essentially open for business year-round and would have accepted jobs any time the weather permitted.

The Commissioner found that under the applicable rule, employer and VRGC were subject to maximum penalties of $37,050 and $1750, respectively.[1] See Rules for Administrative Citations and Penalties, Stop Work Orders and Debarment, Rule 45, Code of Vt. Rules 24 010 005 [hereinafter Rule 45], http//www.lexisnexis.com/hottopics/codeofvtrules. However, he concluded that mitigation of these fines was appropriate because the penalty amounts significantly exceeded the amount of any premium expenditures that employer would have paid if he had secured insurance. The Commissioner found that the other potential mitigating factors set forth in the rule did not apply. The Commissioner assessed penalties of $4825 against employer and $175 against VRGC. He explained that these amounts were adequate to further the Department's goals of incentivizing future compliance and neutralizing any advantage that employer and VRGC may have enjoyed by saving money on required insurance premiums. This appeal followed.

Vermont law requires employers to secure workers' compensation insurance for their employees. 21 V.S.A. § 687(a). If the Commissioner determines after a hearing that an employer has failed to secure insurance, the employer may be fined up to $100 per day for the first seven days the employer neglected to secure insurance and up to $150 per day thereafter. Id. § 692(a).

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[1] Under the current version of Rule 45, which became effective on February 13, 2017, the per-day penalty for failure to secure insurance depends on the employer's North American Industrial Classification System code, as well as the number of previous violations. Rule 45, § 45.5510. The investigator apparently applied the current penalty structure to the entire period during which employer was uninsured, resulting in the proposed penalty amount of $47,200. However, the previous version of Rule 45 provided that an employer who failed to secure coverage would be assessed a penalty of $50 per day up to a maximum of $5000. See Rules for Administrative Citations and Penalties, § 45.5100 [hereinafter Prior Rule 45], https://labor.vermont.gov/document/rule-45-rules-administrative-citations-and-penalties [https://perma.cc/S624-T8WA]. The Commissioner determined that the 2017 amendment to Rule 45 affected the substantive rights of the parties because it removed the penalty cap and changed the formula for calculating penalties, and therefore could not apply retroactively. He therefore concluded that employer was subject to a maximum penalty of $5000 for the 303 days he was uninsured before the rule was amended in February 2017, and $32,050 for the 641 days he was uninsured afterward.

As required by statute, the Commissioner has adopted a rule governing the amount and imposition of penalties, known as Rule 45. See 21 V.S.A. § 688(b); Rule 45. Rule 45 provides that the Commissioner "may reduce the assessed penalty if the employer demonstrates" that: (1) "the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected"; (2) "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) "the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees."[2] Rule 45, §§ 45.5520-45.5550.

On appeal, employer argues that the Commissioner erred in determining that employer had employees in 2016 and misapplied the first and second mitigating factors set forth in Rule 45. "On review, we will generally defer to administrative bodies, both in their findings of fact and their interpretations of their governing statutes and regulations." In re Chatham Woods Holdings, LLC, 2008 VT 70, ¶ 6, 184 Vt. 163. We presume that the Commissioner of Labor's decisions are "correct, valid, and reasonable, absent a clear and convincing showing to the contrary." Id. (quotation omitted). We will affirm the Commissioner's findings of fact unless they have no evidentiary support in the record. Cehic v. Mack Molding, Inc., 2006 VT 12, ¶ 6, 179 Vt. 602 (mem.).

Employer first argues that it was error for the Commissioner to fine him for the entire 944-day period because he only performed a few greenhouse-assembly jobs during 2016 and 2017 and the business did not generate much income. We see no error. The Commissioner's determination that employer had employees in 2016 was based on employer's own spreadsheet, which showed that employer paid four different individuals to help him on five different dates in 2016. Employer does not argue that the nature of his relationship with these individuals fundamentally changed between 2016 and 2017, when he concedes they qualified as employees. See 21 V.S.A. § 601(14) (defining who is "employee" for purposes of workers' compensation). Nor does he challenge the Commissioner's finding that he was essentially "open for business" throughout this period. He was therefore required to secure workers' compensation insurance, regardless of how casual or unsuccessful the business was at first. 21 V.S.A. § 687(a). As we have explained previously, because the workers' compensation statute is remedial in nature, we construe it liberally in favor of providing workers with benefits. Chatham Woods Holdings, 2008 VT 70, ¶ 8. The Commissioner's interpretation of the law in this case furthers the remedial goals of the statute by "tend[ing] towards inclusivity." Id. (holding that Commissioner's finding that developer had to provide insurance for contractors operating as sole proprietors was consistent with remedial purpose of statute).

In addition, although the initial proposed penalties included daily assessments for failing to secure insurance through significant time periods during which employer's employment of others to assist with greenhouse assembly work was infrequent and sporadic, the Commissioner's substantial penalty reduction significantly mitigates the impact of the initial per-day assessment.

Employer also claims that the Commissioner erred by failing to further mitigate the penalties based on excusable neglect. Employer argues that because the Commissioner found that employer did not consider his workers to be employees before the Department's investigation began and acted promptly in securing insurance afterward, the Commissioner had to find excusable neglect. This argument lacks merit. The Commissioner has discretion to mitigate penalties if the

[2] The prior version of Rule 45 contained identical language. Prior Rule 45, §§ 45.5100-45.5112.

employer demonstrates that one or more of the factors set forth in Rule 45 are satisfied. See Rule 45, § 45.5520 (providing that Commissioner "may" reduce penalties if employer demonstrates one or more of three factors). The Commissioner acted within his discretion in concluding that employer's incorrect belief that he did not need workers' compensation insurance did not amount to excusable neglect. As we have explained in other contexts, ignorance of the law usually does not constitute excusable neglect. In re Lund, 2004 VT 55, ¶¶ 5-7, 177 Vt. 465 (holding that attorney's mistake of law did not constitute excusable neglect permitting court to extend time for filing notice of appeal); see also Citibank (S. D.), N.A. v. Dep't of Taxes, 2016 VT 69, ¶ 28, 202 Vt. 296 ("[R]etailer is essentially positing that it should not incur penalties because it was ignorant of the tax law, an untenable defense in any jurisdiction."). The Commissioner's conclusion was "in accordance with the time-honored principle that all persons are presumed to know the law." Longe v. Boise Cascade Corp., 171 Vt. 214, 226 (2000) (quotation omitted).

Next, employer contends that the Commissioner's finding that he had avoided $3369.88 in premiums by failing to obtain insurance was unsupported by the evidence presented at the hearing. Accordingly, employer claims, the Commissioner should have accepted the lower figure calculated by employer and in turn imposed a lower penalty.

The Commissioner's finding was not clearly erroneous. While it is true that the precise figure of $3369.88 was not mentioned in the hearing testimony, it was drawn from the investigator's report, which was admitted as part of the evidentiary record at the beginning of the hearing. Employer did not object to the admission of the report. Furthermore, the Department's investigator testified consistently with her report that she had calculated the avoided premiums to be approximately $3400. Employer had the opportunity to cross-examine the investigator about how she calculated the avoided premiums but did not do so. The Commissioner's finding is supported by credible evidence and is therefore not clearly erroneous, even though employer presented conflicting evidence. Cehic, 2006 VT 12, ¶ 12 (concluding that Commissioner's findings were "supported by evidence, despite some evidence to the contrary, and therefore [were] not clearly erroneous").

Finally, we reject employer's argument that the reduced penalties imposed by the Commissioner were disproportionately higher than fines imposed by the Commissioner in other cases where, unlike here, employers intentionally failed to obtain insurance. Assuming that these prior decisions were the kinds of legal rulings to which the doctrine of precedent applies, rather than case-specific findings of fact, the Commissioner acted consistently with them. Cf. In re Apple Hill Solar LLC, 2019 VT 64, ¶ 25 (noting that agency may depart from its own precedent as long as it provides nonarbitrary reason for departure). The penalties imposed by the Commissioner were approximately one-and-a-half times greater than the amounts of the premiums employer and his company avoided. This is consistent with the previous decisions of the Commissioner cited by employer, in which the Commissioner imposed penalties that ranged between one to two times the calculated amount of premium avoidance. See, e.g., Worker's Comp. & Safety Div. v. Aardvark Excavating, Inc., No. 31-19 WCPen (March 23, 2020) (finding that proposed penalty of $12,000 significantly exceeded avoided premiums of $5525 because it was more than twice as much, and imposing reduced penalty of $7500), https://outside.vermont.gov/dept/labor/Pages/default.aspx [https://perma.cc/6T8M-JCTE]; Workers' Comp. & Safety Div. v. L&L Transit, No. 19-11 WCPen (Sept. 20, 2012) (declining to reduce proposed maximum statutory penalty because it was only eight percent higher than avoided premium amount of $156,087), https://outside.vermont.gov/dept/labor/Pages/default.aspx [https://perma.cc/TH4P-3H29]; Workers' Comp. & Safety Div. v. Peter Leo Goldsmith, LLC, No. 25-11 WCPen (June 21, 2012) (reducing penalty from $50,000 to $45,000 where employer

avoided premiums of $23,201), https://outside.vermont.gov/dept/labor/Pages/default.aspx [https://perma.cc/M29G-KMLH].

For these reasons, we affirm the Commissioner's decision.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice