

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RI 02903

AMICA MUTUAL INSURANCE CO.)
Complainant)

vs.) DBR NO.: 07-L-0178
)
D & H AUTO BODY)
Respondent)

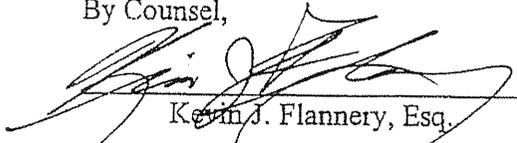
CONSENT ORDER

It is hereby agreed between the Department of Business Regulation (“Department”), Amica Mutual Insurance Company (“Complainant”) and David Hayes, Jr., (“Respondent”) as follows:

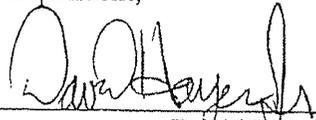
1. Respondent is the holder of license #874.
2. A hearing was scheduled on March 21, 2008, to determine whether Respondent will be held liable for any violations of R.I. Gen. Laws §5-38-1 *et seq.*
3. On March 20, 2008, the parties informed the Department of Business Regulation that they had resolved their issues and there would be no need to institute further administrative proceedings.
4. The parties agree to the following resolution:
5. That the Respondent will pay to the Complainant the amount of \$8,000 to be paid in monthly increments of \$500. The first payment is due 30 days after the date that this Consent Order is adopted by the Director of the Department of Business Regulation, and
6. Respondent further agrees that allowing its customers the use of a motor vehicle to which the customer’s registration plates have been attached, while the customer’s own vehicle is being repaired, is not considered a rental of a vehicle under the Rhode Island General Laws.

7. That Respondent agrees that on any future rental invoices submitted to Complainant, each invoice will include the make and model of the vehicle rented, registration number and VIN of the rented vehicle, sales tax charged and surcharge assessed in accordance with R.I.G.L. 31-34.1-2. Further, if the rental invoice does not include this information, Complainant will be under no obligation to pay the rental invoice until the required information is provided thereon.

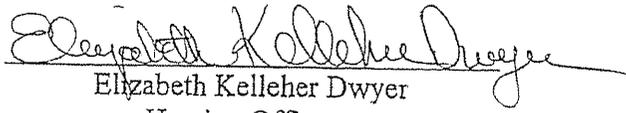
Complainant
By Counsel,


Kevin J. Flannery, Esq.
Dated: 0-6-08

Respondent,


David Hayes, Jr.
Dated: _____

I hereby approve of the foregoing Consent Order and recommend its adoption.


Elizabeth Kelleher Dwyer
Hearing Officer

Dated: 7-2-08

I have read the Hearing Officer's Decision and Recommendation in this matter and I hereby

ADOPT
 REJECT
 MODIFY

the Decision and Recommendation.


A. Michael Marques
Director
Dated: 7-02-08

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42 CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS ORDER. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

AMICA INSURANCE COMPANY, :
COMPLAINANT, :
v. : DBR No. 07-L-00178
D&H AUTO BODY, :
RESPONDENT. :

DECISION ON MOTION TO DISMISS

Hearing Officer: Elizabeth Kelleher Dwyer
Hearing Held: December 12, 2007
Appearances: Kevin Flannery, Esq. on behalf of Complainant
Eric Marion, Esq. on behalf of the Respondent

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation ("Department") as the result of two complaints filed by Amica Insurance Company on February 13, 2007 and March 14, 2007 against D & H Auto Body ("Respondent.") After an investigation by the Department, an order appointing the undersigned as Hearing Officer was issued on July 3, 2007. A prehearing conference was held on October 4, 2007. At the prehearing conference Respondent filed motion to dismiss the complaint. The Hearing Officer scheduled a hearing on that motion for December 12, 2007 and ordered that briefs on the motion to dismiss be filed on or before December 7, 2007.

Respondent submitted into evidence an affidavit from David W. Hayes, Jr. dated March 6, 2007 in which Mr. Hayes agreed, "in conjunction with the transfer of the license

of D&H Auto Body #874” to abide by the terms of a Departmental Consent Order entered against D & H Auto Body on April 24, 2003. (The Affidavit and Consent Order were entered into evidence as Respondent Exhibit 1). Complainant entered into evidence a series of correspondence from Respondent to Amica and checks from Amica to Respondent. (These documents were entered into evidence collectively as Complainants Exhibit 1). The hearing was held open for a week for the parties to submit additional briefs or evidence. On December 13, 2007 Complainant submitted a letter with additional argument and Respondent submitted a Reply Memorandum.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws §§ 5-38-1 *et seq.*, 42-14-1 *et seq.*, and 42-35-1 *et seq.* At the argument on the Motion to Dismiss, Respondent briefly raised an issue as to whether the Department had jurisdiction over Respondent in this matter. As discussed in detail in this motion the corporate ownership of the business licensed as “D & H Auto Body” changed and on this basis Respondent initially questioned the Department’s jurisdiction. After raising this argument, Respondent thereafter stated that the licensee had voluntarily appeared in response to the Department’s Order. The Department, therefore, does not take this statement as a challenge to jurisdiction. Since it was raised, however, the Department states that it has jurisdiction over all licenses including the license of D&H Auto Body, regardless of the ownership of the individual or entity operating under the license.

III. DISCUSSION

Respondents’ motion is premised on the fact that, at the time of the alleged incidents the owner of the business was D & H Auto Body, Inc. and that the business was

subsequently transferred to a different corporate entity, D&H Collision Center LLC. Amica agrees with the fact that D & H Auto Body, Inc. was the entity that owned the business at the time of the incidents but alleges that D & H Collision Center LLC is a successor corporation liable for the actions of D & H Auto Body, Inc. The license in question, number 874, is issued to "D&H Auto Body, 15 Aster Street, West Warwick, RI 02893." This license was "transferred" from D & H Auto Body, Inc. to D & H Collision Center LLC effective in 2007. The license name "D & H Auto Body" and the license number "874" remain the same.

Amica offered evidence in support of its position that D & H Collision Center LLC is a successor corporation to D & H Auto Body, Inc. and is responsible for any regulatory violations which occurred under the license. Amica asserts that the business continues to be operated at 15 Aster Street, West Warwick, Rhode Island. This assertion was not denied by Respondent. Amica provided a photograph of the business which show signs identifying the business as "D & H Auto Sales & Body Repair LIC# 874"; "D & H Auto Body" and "D & H Car and Truck Rentals" and asserted that these are the same signs as existed when the business was owned by D & H Auto Body, Inc. This assertion was not denied by Respondent. Amica introduced a series of "Directions to Pay" sent from Respondent to Amica between March 5, 2007 and August 29, 2007. In these faxes the auto body shop *identifies itself* as "D & H Auto Body, Inc." All of these documents are dated subsequent to the dissolution of D & H Auto Body, Inc., the formation of D & H Collision Center LLC and the "transfer" of the license. Amica also produced a series of checks from it to Respondent dated between March 2007 and July 2007 and made payable to D & H Auto Body, Inc or D & H Auto Rental.

Amica argues that these documents show that the business is currently being operated as a continuation of D & H Auto Body, Inc and, therefore, Respondent is responsible for acts that occurred under the license during the time that D & H Auto Body, Inc owned the business.

David Hayes, Jr. testified that D & H Auto Body, Inc had been owned by his Grandmother, Gina Hayes. His Grandmother passed away in 2006 and the business was transferred to him as sole owner of D & H Collision Center LLC.¹ He stated that D & H Auto Body, Inc was a family business and he had worked at the business on and off for a number of years.

Respondent did not file the “purchase of assets” agreement between D & H Auto Body, Inc. and D & H Collision Center LLC but did state in response to Interrogatory number 2 that consideration for the asset transfer was that D & H Collision Center LLC’s “...principal would commit to a term of apprenticeship.” This is the only piece of information the Hearing Officer has received about the consideration for this transaction. Respondent did not produce any evidence or testimony to dispute Amica’s contention that the business has been operated as a continuation of the business in existence prior to the “transfer” to the new corporation.

In its reply memorandum, Respondent argued that even though it is not liable for D & H Auto Body, Inc.’s liabilities it is authorized to accept and negotiate checks made payable to D & H Auto Body, Inc. Respondent argues that “...Amica erred in drafting

¹ The involvement of David Hayes, Sr., Mr. Hayes father, in the business is limited by the terms of the Consent Order admitted as Respondent Exhibit 1.

checks to a defunct entity but small business owners cannot interrupt their income stream to force large companies such as Amica to comply with strict corporate formalities.” Respondent does not address the fact that the invoices sent to Amica by Respondent were on fax sheets entitled “D & H Auto Body, Inc.” nor do they provide any evidence that Amica was at any time notified of a change in ownership.

The Hearing Officer finds that Complainant has raised sufficient facts to bring into issue whether D & H Collision Center LLC is a “successor corporation” to D & H Auto Body, Inc. Respondent did not provide any evidence to refute this contention, rather, Respondent simply argued that the formation of D & H Collision Center LLC vitiated any responsibility of the licensee for actions which occurred under the license while the owner of the business was D & H Auto Body, Inc. As discussed in Amica’s opposition, while the purchase of assets by one corporation does not automatically make the purchaser liable for the debts of the transferor, the transferor will be liable where the new company “...is merely a continuation or a reorganization of another and the business or property of the old corporation has practically been absorbed by the new...” *H.J. Baker & Bro., Inc. v. Organics, Inc.*, 554 A.2d 196 (R.I. 1989). In *H.J. Baker & Bro., Inc.* the Supreme Court identified seven criteria which should be analyzed in determining whether the new company should be held liable for the debts of the old company. Those criteria, as applied to this case are:

1. There is a transfer of corporate assets. Respondent has indicated that the entire business and all of the assets were taken over by the new corporation.
2. There is less than adequate consideration. The agreement between the corporations was not provided for the Departments review. The only

information regarding consideration is an interrogatory response indicating that consideration for the transfer was an agreement that the principal of the new corporation would “serve an apprenticeship.” It is completely unclear how this could possibly constitute a “arms length transaction” or “good and valuable consideration.” With an ongoing business with assets and good will a transfer where no amount of money or property was transferred would appear to be less than adequate consideration.

3. The new company continues the business of the transferor. The documents produced by Amica show that the business continues to be operated at the same facility, in the same manner, under the same license and that the business itself continues to use the name of the old corporation.
4. That both companies have common officers or directors. This factor is not met in this case. The only officer of the prior corporation is deceased. The only officer of the new corporation is her grandson.
5. The transfer renders the transferor incapable of paying its creditors. This factor is met on the representation of Respondent that D & H Auto Body, Inc. has been dissolved. It does not appear that that corporation received any consideration of value in the transfer and could not, therefore, meet its obligations to creditors.
6. Common identify of officers, directors and stockholders. As with criteria 4 this factor is not met in this case.
7. Continued use of the same office space and service to the same client base. Amica’s evidence shows that this factor is met.

If the allegations made by Amica are proven to be true, D & H Auto Body, Inc submitted fraudulent documents to Amica and received payments based upon these fraudulent documents. If this fraud were vitiated by an "asset transfer" to a new corporation while still allowing the business to operate under the auto body license, the entire purpose of licensing auto body shops would be undermined. In this case D & H Collision Center LLC did not open a new business which would have had to struggle with all of the challenges that opening a new business entails, including obtaining an auto body license and developing good will. Rather, D & H Collision Center LLC had the license issued to "D & H Auto Body" transferred to it as the new owner of the business and continued to operate the business in the same manner as D & H Auto Body, Inc. In accepting the benefits of such a transaction it must also accept the liabilities, in the case answering for the actions of the business when it was owned by a different corporate entity. To hold otherwise would essentially vitiate the Department's jurisdiction as a corporate owner could simply dissolve one corporation and form another to avoid regulatory liability for actions of the prior corporation.

Although not necessary to decide in this case, the Hearing Officer would also like to note that the idea of a "successor corporation" is concept of civil law to determine who is liable for certain debts. The jurisdiction of the Department is regulatory and is over the license. The Department does not award damages as would a civil court. Rather its jurisdiction is over the license. The mere fact that the ownership of the business licensed has changed does not negate the Department's regulatory control over that license. Therefore, the fact that a license has been transferred or a business sold does not necessarily

insulate the new owners from regulatory action based on facts which occurred under the license prior to the transfer of ownership.

IV. FINDINGS OF FACT

1. On or about February 13, 2007 and March 14, 2007, complaints were filed against Respondent.
2. After an investigation by the Department, an order appointing the undersigned as Hearing Officer was issued and a pre-hearing conference was held in this matter on October 4, 2007. At the prehearing conference the instant motion to dismiss was filed.
3. A hearing on the motion to dismiss was held on December 12, 2007. Both Complainant and Respondent filed initial and reply briefs.
4. The license at issue is issued to "D & H Auto Body".
5. In 2007 the license was transferred to the newly formed D & H Collision Center LLC.
6. The previous corporate owner of the businesses, D & H Auto Body, Inc. was dissolved and no longer has assets.
7. The new corporate owner continued the business as it had operated under the previous corporate entity continuing to use the previous corporate name and utilizing the assets of the prior corporate owner.
8. No valuable consideration was given for the transfer of the assets.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented I conclude as follows:

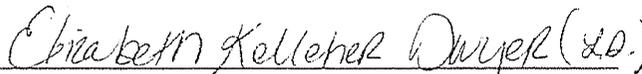
1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 5-38-1 *et seq.*, 42-14-1 *et seq.*, and 42-35-1 *et seq.*
2. D & H Collision Center LLC is a successor corporation to D & H Auto Body, Inc. for purposes to regulatory liability of the license issued to D & H Auto Body Inc.
3. The licensee may be found to have violated R.I. Gen. Laws § 5-38-1 *et seq.* as the result of actions which took place while the business was owned by a predecessor corporate entity.

VIII. ORDER

Based on the above analysis, the Hearing Officer orders that

1. Respondent will be held liable for any violations of R.I. Gen. Laws § 5-38-1 *et seq.* that are proven at the hearing of this matter regardless of the corporate ownership of the licensee at the time of the violations.
2. The hearing on the merits of this matter will be held on **January 23, 2008**. The time of the hearing will be moved from the previously scheduled 10:00 am and will now proceed at **1:00 pm**.

Dated: January 14, 2008


Elizabeth Kelleher Dwyer, Esq.
Hearing Officer

CERTIFICATION

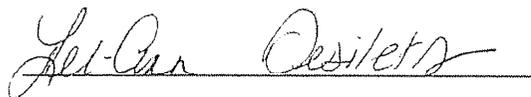
I hereby certify on this 17th day of January 2008 that a copy of the within Decision on Motion to Dismiss was sent by first class mail, postage prepaid to

Kevin J. Flannery, Esq.
Law Offices of James V. Murray
10 Amica Center Blvd.
1st Floor
Lincoln, Rhode Island 02865

Eric Marion, Esq.
DiLibero & Coloian LLP
130 Dorrance Street
Providence, Rhode Island 02903

and by hand-delivery to

Jeanne McCarthy
Department of Business Regulation
233 Richmond Street
Providence, Rhode Island 02903.

A handwritten signature in cursive script, reading "Let-Car Desilets", is written over a horizontal line.