

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-4245

DIGITAL ACCESSORIES CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on October 8, 2018, via teleconference with sites in Tallahassee and Jacksonville, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

For Petitioner: Taylor Anderson, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Laura J. Benson, pro se
Digital Accessories Corporation
Suite 100
2021 Art Museum Drive
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Digital Accessories Corporation ("Digital"), timely filed a request for a formal administrative hearing pursuant to Florida Administrative Code Rule 28-106.111(2).

PRELIMINARY STATEMENT

On December 6, 2017, Petitioner, Department of Financial Services, Division of Workers' Compensation (the "Department"), issued a Second Amended Order of Penalty Assessment (the "Second OPA") and served it on Digital; that is, to its representative, Laura Benson. Mrs. Benson, on behalf of Digital, prepared and filed a request for a formal administrative hearing. The Department rejected the request for hearing as being untimely, and Digital requested an administrative hearing to contest that determination. The instant proceeding resulted.

At the final hearing, the Department called one witness: David Gallegos, a compliance investigator. The Department offered its Exhibits 1 through 11, each of which was admitted into evidence. Mrs. Benson testified on behalf of Digital. Digital's Exhibits 1 through 5 were admitted into evidence.

A transcript of the final hearing was ordered; it was filed at DOAH on October 25, 2018. The parties agreed to submit proposed recommended orders ("PRO") within 10 days after the

Transcript was filed with DOAH in accordance with rule 28-106.216. Each party timely submitted a PRO, and each was duly considered in the preparation of this Recommended Order.

Unless specifically stated otherwise herein, all references to Florida Statutes concerning the substantive facts of this case shall be to the 2018 version.

FINDINGS OF FACT

Based upon the evidence presented, the demeanor and credibility of the witnesses, and the entire record in this case, the following Findings of Fact are made:

1. The Department is the state agency responsible for monitoring the provision of workers' compensation insurance by employers in this state.

2. Digital is a family business. Its owner (Mrs. Benson's father) created a company called Central Voice, Inc. ("Central"), in 1969 as a retail business. The business was run by Mrs. Benson's family, i.e., her parents and siblings. After some years of operation, the family created another corporation, Digital, to deal with the wholesale side of the business. Again, this business was run by the family, most of whom worked primarily for Central. Central properly maintained workers' compensation insurance coverage for the family members/employees. Digital really only had one functional employee; a store manager, and some part-time help

on an as needed basis. Mrs. Benson's father, as owner of the company, also worked for Digital. In recent years, both companies were "surviving, not thriving," according to Mrs. Benson.

3. As a result of the businesses' struggles, the family decided that payment of the family's salaries would be split between Digital and Central as a means of each business sharing some of the financial burden. In an abundance of caution, Mrs. Benson inquired of her insurance carrier whether Digital needed workers' compensation insurance since its "employees" were primarily employees of Central and Central insured those persons. She was wrongly advised that the employees were sufficiently covered under Central's policy.

4. On August 14, 2017, investigator Gallegos conducted an inspection at the businesses for the purpose of assuring that the companies were compliant with workers' compensation requirements. Mrs. Benson gave Gallegos copies of Central's workers' compensation insurance information and explained to him what her carrier had told her concerning the need for a policy for Digital employees. Gallegos explained to Mrs. Benson that, despite what she was told, Digital had more than four employees (on the books) and was required to have workers' compensation coverage for them unless they were exempted. Mrs. Benson immediately went on-line to add her

younger brother and sister to the list of officers of Digital so they could apply for exemptions.

5. Based on his findings, Gallegos determined that Digital was not in compliance with workers' compensation requirements. He then prepared a Stop-Work Order ("SWO"), which he handed to Mrs. Benson on the spot. The SWO contained a notice of rights, which was explained to Mrs. Benson by Gallegos, and imposed an estimated minimum penalty of \$1,000. He also discussed with Mrs. Benson that she might reduce the ultimate penalty by 25 percent if she would timely, i.e., within 20 days, provide certain business records to the Department. Mrs. Benson obtained a \$1,000 money order the very next day and, along with the records she believed had been requested, delivered the money order and the financial documents to the Department within two days.

6. About two months later, on October 11, 2017, the Department issued an Amended Order of Penalty Assessment ("OPA") and served it on Digital. Despite having paid the \$1,000 minimum penalty and providing all the records she believed had been requested--and even being told by someone at the Department that she had provided more than requested--the OPA asserted a penalty of \$28,490.12. Mrs. Benson was incredulous at this assessment, because not only had Digital (and Central) always attempted to comply with workers'

compensation requirements, she had tried to do exactly what the Department asked of her. In fact, while Gallegos was still at her office that day, she copied the additional records he requested and gave them to him.

7. On December 6, 2017, Mrs. Benson went to the Department's local office. She was hand-served the Second OPA, which amended the penalty to \$27,485.68. Again, Mrs. Benson was incredulous. She had continuously attempted to cooperate with the Department and acted in good faith. But not only did she fail to receive the 25 percent discount alluded to earlier, her efforts seemed to have made little difference in the assessment. The Second OPA contained a notice of rights which directed Digital as follows:

"You have a right to request a hearing . . . to contest this agency action. [Y]ou must file the petition for hearing so that it is received by the Department within twenty-one (21) calendar days of your receipt of this agency action."

The Second OPA concluded, in capital letters and in bold font:

"FAILURE TO FILE A PETITION WITHIN THE TWENTY-ONE (21) CALENDAR DAYS OF RECEIPT OF THIS AGENCY ACTION CONSTITUTES A WAIVER OF YOUR RIGHT TO ADMINISTRATIVE REVIEW OF THE AGENCY ACTION."

8. The notice of rights did not specify a time of day that the request for hearing must be filed with the Department.

Mrs. Benson presumed she had until 11:59 p.m. on December 27, 2017, of the twenty-first day to file her request for a hearing. (The notice of rights did not specify a date either, leaving it up to the affected business to calculate the twenty-first day on its own.)

9. After being served with the Second OPA, the holiday season ensued, including Christmas, Hanukah, and Kwanzaa, among others. Mrs. Benson and others from Digital took time off from work to be with family and celebrate the holidays. Upon returning to work on December 26, 2017, the day after Christmas and the first workday after the holidays, Mrs. Benson was inundated with numerous work-related tasks. At some point she remembered the request for hearing and turned to that item of business. She discovered that the request was due the next day, December 27, 2017, and immediately set about preparing the request for hearing and related attachments. She put together all of the information, not without considerable effort, and made arrangements to ship it to Tallahassee for submission to the Department. Through social media, her family contacted a friend in Tallahassee who agreed to pick up the request from a printer and deliver it to the Department. Mrs. Benson had rationally assumed that she had until 11:59 p.m. to submit the petition, as neither the SWO nor the OPAs contained a 5:00 p.m. deadline.

10. The family friend picked up the request from the printer sometime on December 27, 2017. He immediately drove to the Department's headquarters at 200 East Gaines Street, Larson Building, Tallahassee, Florida. When he arrived, at just after 8:00 p.m., the building was locked and there was no one available to accept the request. The friend then slipped the request under the door of the building, taking a picture of it through the glass door to show that it had been "delivered" to the Department on the date that it was due. Meanwhile, Mrs. Benson diligently searched the Department's website and found that she could also email the request, which she did at 9:42 p.m. that same day.

11. The Department, as is its custom and practice, clocked the request in as received on the next morning, December 28, 2017, i.e., one day after it was due. The Department relied upon rule 28-106.104(3), which states that: "Any document . . . received after 5:00 p.m. shall be [deemed] filed as of 8:00 a.m. on the next regular business day." Based on that rule, the Department rejected the request for hearing, finding that it was not timely filed.

12. Digital requested an administrative hearing to contest the rejection of its request for hearing on the Second OPA. The instant proceeding ensued.

13. Mrs. Benson credibly explained the reasons that Digital's request for a hearing was late. She noted that, to begin with, she was very angry at the Department for rejecting her sincerely-filed financial documents when first requested. Digital has always paid its taxes and has tried to be a good corporate citizen. Digital had no frame of reference to help it understand the SWO and related documents; it had never been in that position before. Digital had never been fined or cited for improper workers' compensation insurance, always striving to do what was right and legal.

14. The holiday season was also a major contributing factor. Whoever at the Department decided to deliver the Second OPA to Digital on December 6, making the response due just two days after Christmas, may just have had a mean streak. Why not just serve the Second OPA on December 4, making it due on Christmas day? It is completely reasonable for a layperson to believe that the holiday season would have an effect on time frames for filing a petition for hearing. It would have been simple for the Department's representatives to have made the requirement for filing BEFORE FIVE O'CLOCK clear and precise, but there is no legal requirement for the Department to do so.

15. The Second OPA did not, in its bold print, capitalized statement regarding a response, indicate that there was a 5:00 p.m. cutoff for filing the request. Nor,

apparently, did the person who served the Second OPA on Mrs. Benson address that fact.

16. Alas, these very understandable and rational reasons for not filing the request for hearing timely do not obviate the requirement to do so. Nor does lack of familiarity with the Florida Administrative Code excuse a layperson from complying with its rules. Mrs. Benson simply did not know. Best intentions, and all that.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

18. Section 120.57(1)(j) dictates that in formal administrative hearings, "Findings of fact shall be based upon a preponderance of evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute."

19. Rule 28-106.111 states:

(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.

* * *

(4) Any person who receives written notice of an agency action and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

20. Section 120.569(2)(c) provides that a request for an administrative hearing "shall be dismissed . . . if it has been untimely filed." (Emphasis added). The statute also notes that the defense of equitable tolling is available. See Pro Tech Monitoring, Inc. v. Dep't of Corr., 72 So. 3d 277, 281 (Fla. 1st DCA 2011).

21. "The equitable tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." (Citations omitted). Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

22. There is no evidence in this case that Digital was prevented from filing its request for a hearing, nor misled from doing so. Although there was a lot going on in the holidays and Mrs. Benson was extremely busy, no one prevented the filing of the request. It would be a stretch of the Machules standard to suggest that Mrs. Benson was misled, though she certainly had reason to be confused.

23. Not so clear is whether Digital was lulled into inaction. Clearly, the onset of the holiday season, just when the request was due, created extreme distractions. Noting she was already frustrated with the Department for being so strict and unyielding, refusing to talk reasonably, Mrs. Benson was not focused on the hearing request during her holiday break. She was thus lulled into inaction, though by her own volition.

24. Further, Mrs. Benson correctly notes that the very important notice of rights, in bold and capital letters, nonetheless, said nothing whatsoever about the request being due by 5:00 p.m. Nor did the notice cite to rule 28-106.104(3), which sets 5:00 p.m. as the deadline for filing any document with the Department. Conversely, the notice did cite to other statutes and administrative rules, but not the time rule. Had the rule requiring filing by 5:00 p.m. been cited, it is probable Mrs. Benson would have attempted to comply, the same as she attempted to comply with her mistaken 11:59 p.m. deadline.

25. Although Investigator Gallegos discussed the Second OPA with Mrs. Benson when he delivered it, he did not suggest to her that she must file her request on or before 5:00 p.m. He did stress the 21-day deadline and that it was important to comply with that time frame. As Mrs. Benson testified, she is a layperson and is certainly not conversant with the law that

applies in these kinds of situations. Thus, she relied upon the Department to advise her of all her rights and responsibilities.

26. Taking all the facts and applying the law as it exists, Digital did not (technically, legally) file its petition for a formal administrative hearing timely. However, when the Department ultimately assigns its penalty, the entirety of the facts ought to be taken into consideration.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that:

Petitioner, Department of Financial Services, enter a Final Order deeming the request for hearing filed by Respondent, Digital Accessories Corporation, not timely filed.

DONE AND ENTERED this 7th day of November, 2018, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of November, 2018.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.