

**STATE OF SOUTH DAKOTA  
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF  
AUA, INC.**

**PROPOSED ORDER  
DLR/INSURANCE 13-03**

An administrative hearing in the above matter was held on April 4, 2013. AUA, Inc. failed to appear. Frank Marnell appeared as counsel for the Division of Insurance (hereinafter sometimes referred to as "Division"). The matter was tape recorded. There is no written transcript of the tape; therefore no citation to page number will be included. Exhibits 1 through 5 were admitted and will be denoted by EX followed by the appropriate number.

**ISSUE**

Whether the Non-Resident Business Entity Insurance Producer's License of AUA, Inc. should be revoked due to failure to respond in a timely manner to the inquiries of the South Dakota Division of Insurance, dated September 21, 2012 and October 22, 2012, regarding the failure to report a termination for cause of a producer's agreement with U.S. Specialty Insurance Company and for failure to notify the Division of its address change within thirty days of the change. (SDCL 58-33-66(1), SDCL 58-30-157 and 58-30-167(2))

**FINDINGS OF FACT**

I.

AUA, Inc. possesses a Non-Resident Business Entity Insurance Producer's License from the State of South Dakota. The original license issue date was November 11, 2005 and the status is listed as active. (EX 1)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information via a letter dated September 20, 2012 from U.S. Specialty Insurance Company stating that they had terminated the producer agreement for cause. The termination was the result of AUA's failure to pay its accounts current in a timely manner. The producer agreement termination was dated September 12, 2012. (EX 2)

III.

AUA, Inc. had not reported this termination to the South Dakota Division of Insurance.

IV.

Ms. Lang wrote AUA, Inc. a letter on September 21, 2012 inquiring why the company had not reported to the Division the termination for cause from U.S. Specialty Insurance Company. She

further requested that they explain, in their own words, what the facts were, whether they solicit or write any insurance business in South Dakota and to provide other specific information. AUA, Inc. was informed that they had twenty days to respond. (EX 3-A) This is a standard letter sent when an individual or a business entity is terminated for cause. The September 21, 2012 letter was mailed via first class to AUA, Inc. at 704 N. Regional Road, Greensboro, NC 27409. (EX 3-A) This was the address listed on the Individual Information Inquiry on file with the Division. (EX 1)

V.

Ms. Lang received notification from the United States Postal Service that the address for AUA, Inc. had changed. The new address is 2129 1<sup>st</sup> Ave N, Birmingham, AL, 35203-4201. (EX 3-B)

VI.

Ms. Lang sent a second letter to AUA, Inc. on October 22, 2012. Two copies of this letter were sent, one via certified mail and an exact copy sent via first class mail, wherein AUA, Inc. was given notice that they failed to respond to Ms. Lang's September 21, 2012 letter and they were in violation of SDCL 58-33-66(1) (failing to respond to the Division within twenty days of receipt). AUA, Inc. was once again given twenty days to respond. (EX 4-A and 4-B) This letter was sent to both mailing addresses. (EX 4-A) Both certified letters were delivered in Birmingham, AL, on October 25, 2012. (EX 4-C)

VII.

As of the date of the hearing Ms. Lang received no response to her attempts to contact AUA, Inc. in September and October of 2012.

VIII.

On October 22, 2012, the Department received a letter from QBE the Americas stating that "...we are notifying the Department that AUA, Inc.'s entity appointments with the QBE affiliated insurers identified above have been terminated "for cause" based on a failure to remit past due premium totaling \$79,618.03." (EX 5)

IX.

Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.

X.

To the extent any of the foregoing are improperly designated and are, instead, Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

## REASONING

This case involves a request by the Division of Insurance to revoke the South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. As a consequence of the potential loss of Petitioner's livelihood from the lack of licensure, the burden of proof in this matter is higher than the preponderance of evidence standard, which applies in a typical administrative hearing. "In matters concerning the revocation of a professional license, we determine that the appropriate standard of proof to be utilized by an agency is clear and convincing evidence." *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989). Our Supreme Court has defined "clear and convincing evidence" as follows:

The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. The evidence need not be voluminous or undisputed to accomplish this.

*Brown v. Warner*, 78 S.D. 647, 653, 107 NW2d 1, 4 (1961). Licensee did not appear at the hearing.

Heather Lang, compliance agent for the South Dakota Division of Insurance found that AUA, Inc. had not reported to the Division that they were terminated for cause from U.S. Specialty Insurance Company. The specific reasons for termination are set forth in the exhibits and in the Findings of Fact. AUA, Inc. failed to respond in a timely fashion to inquiry made by the Division (letters dated September 21, 2012 and October 22, 2012) regarding the U.S. Specialty Insurance termination in violation of SDCL 58-33-66(1). That statute, in pertinent part, reads as follows:

**SDCL 58-33-66. Unfair or deceptive insurance practices.** Unfair or deceptive acts or practices in the business of insurance include the following:

- (1) Failing to respond to an inquiry from or failing to supply documents requested by the Division of Insurance within twenty days of receipt of such inquiry or request;...

Finally, SDCL 58-30-157 mandates that a licensee "...shall inform the director in a form or format prescribed by the director of a change of address within thirty days of the change." AUA, Inc. did not do this in this matter.

In deciding to revoke an insurance producer's license the Division looks to SDCL 58-33-68 for guidance as follows:

The Division of Insurance, in interpreting and enforcing §§ 58-33- 66 and 58-33-67, shall consider all pertinent facts and circumstances to determine the severity and appropriateness of action to be taken in regard to any violation of §§ 58-33-66 to 58-33-69, inclusive, including but not limited to, the following:

- (1) The magnitude of the harm to the claimant or insured;
- (2) Any actions by the insured, claimant, or insurer that mitigate or exacerbate the impact of the violation;
- (3) Actions of the claimant or insured which impeded the insurer in processing or settling the claim;
- (4) Actions of the insurer which increase the detriment to the claimant or insured. The director need not show a general business practice in taking administrative action for these violations.

However, no administrative action may be taken by the director for a violation of this section unless the insurer has been notified of the violation and refuses to take corrective action to remedy the situation.

Any administrative action taken by the director shall be pursuant to the provisions of chapter 1- 26.

Additionally, the Division will consider SDCL 58-30-167 (shown in pertinent part) below:

**58-30-167. Causes for revocation, refusal to issue or renew license, or for monetary penalty-- Hearing--Notice.** The director may suspend for not more than twelve months, or may revoke or refuse to continue, any license issued under this chapter, or any license of a surplus lines broker after a hearing. Notice of such hearing and of the charges against the licensee shall be given to the licensee and to the insurers represented by such licensee or to the appointing agent of a producer at least twenty days before the hearing. The director may suspend, revoke, or refuse to issue or renew an insurance producer's license or may accept a monetary penalty in accordance with § 58-4-28.1 or any combination thereof, for any one or more of the following causes:...

- (2) Violating any insurance laws or rules, subpoena, or order of the director or of another state's insurance director, commissioner, or superintendent;....

Applying the law to the Findings of Fact it is clear that the South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. should be revoked.

## **CONCLUSIONS OF LAW**

### I.

The Division of Insurance has jurisdiction over the parties and subject matter of this hearing pursuant to Title 58 of the South Dakota Codified Laws. The Office of Hearing Examiners is authorized to conduct the hearing and issue a proposed decision pursuant to the provisions of SDCL 1-26D-4.

II.

The Notice of Hearing was issued on February 25, 2013 by the South Dakota Division of Insurance.

III.

No one on behalf of AUA, Inc. appeared at the scheduled and noticed time of the hearing.

IV.

The Division of Insurance bears the burden of establishing the alleged statutory violations by clear and convincing evidence.

V.

The Division of Insurance established by clear and convincing evidence that AUA, Inc. committed unfair or deceptive insurance practices by violating SDCL 58-33-66(1).

VI.

The Division of Insurance established by clear and convincing evidence that AUA, Inc. violated SDCL 58-30-157.

VII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. is subject to revocation.

VIII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. should be revoked.

IX.

Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.

X.

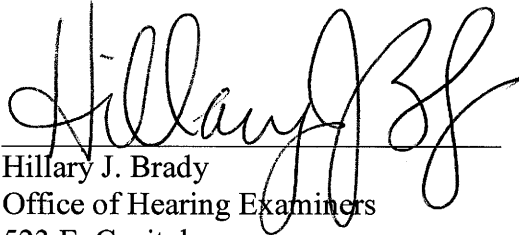
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

Based on the above Findings of Fact, Reasoning and Conclusions of Law, the Hearing Examiner enters the following:

**PROPOSED DECISION**

The South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. should be revoked.

Dated this 26th day of April 2012

A handwritten signature in black ink, appearing to read "Hillary J. Brady", written over a horizontal line.

Hillary J. Brady  
Office of Hearing Examiners  
523 E. Capitol  
Pierre, South Dakota 57501-1538

**SOUTH DAKOTA  
DEPARTMENT OF LABOR AND REGULATION  
DIVISION OF INSURANCE**

**IN THE MATTER OF  
AUA, INC.**

) **FINAL DECISION**  
) **INS 13-03**

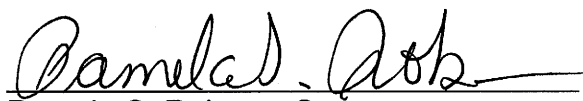
After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-4, the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Decision, dated April 26, 2013, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-Resident Business Entity Insurance Producer's License of AUA, Inc. shall be revoked.

Parties are hereby advised of the right to further appeal the final decision to Circuit Court within (30) days of receiving such decision, pursuant to the authority of SDCL 1-26.

Dated this 7<sup>th</sup> day of May, 2013.



Pamela S. Roberts, Secretary  
South Dakota Department of Labor and Regulation  
700 Governors Drive  
Pierre, SD 57501