

**SOUTH DAKOTA
DEPARTMENT OF LABOR AND REGULATION
OFFICE OF THE SECRETARY**

**IN THE MATTER OF
JOHN FISCHER
LICENSEE**

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FINAL DECISION

INS 12-05

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

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-4, the Hearing Examiner's Findings of Fact, Conclusions of Law and Proposed Decision, dated July 19, 2012, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Resident Insurance Producer License of John Fischer will hereby 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 2nd day of August, 2012.



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

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

**IN THE MATTER OF
JOHN FISCHER**

**PROPOSED ORDER
DLR/INSURANCE 12-05**

An administrative hearing in the above matter was held on March 20, 2012. John Fischer (hereinafter sometimes referred to as "Fischer" or "Licensee") failed to appear. Amber Mulder 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 6 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Resident Insurance Producer License of John Fischer should be revoked due to his failure to make payments upon his child support arrearages pursuant to SDCL 58-30-167(13).

FINDINGS OF FACT

I.

John Fischer possesses an active Resident Insurance Producer License from the State of South Dakota. Fischer became licensed in South Dakota on September 23, 2011. (EX 1)

II.

Matthew Ballard, Compliance Agent for the South Dakota Division of Insurance since August 9, 2011, obtained information from the Department of Social Services on January 12, 2012 that Fischer had his driving license and/or driving privileges revoked in the State of South Dakota for failure to make payments upon his child support arrearages. (EX 2, 3 & 4)

III.

Division Counsel sent a letter on February 22, 2012 via first class and certified mail to Mr. Fischer wherein Fischer was informed that his failure to comply with an administrative order or court order imposing a child support obligation is a violation of SDCL 58-30-167(13). (EX 5) This letter was sent to the address Fischer listed on his Individual Information Inquiry. (EX 1)

IV.

The Director of the Division of Insurance is authorized to revoke an insurance producer license based on a violation of 58-30-167(13).

V.

Prior to the February 2012 letter, Division Counsel had previously attempted to contact Fischer to enter into a Consent Order. He did not respond to that previous contact. (EX 5) The Consent Order option was offered again in the February 22, 2012 letter. (EX 5)

VI.

The February 22, 2012 letter sent via certified mail was returned to the Division stamped that the letter was to be returned to sender as it was undeliverable as addressed and the postal service was unable to forward it. The Division received the returned letter on February 27, 2012. (EX 6) Fischer had never provided the Division with a change of address. Up to and including the time of the hearing the Division had not received contact from Fischer.

VII.

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

VIII.

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 Resident Insurance Producer License of John Fischer. 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). Mr. Fischer did not appear at the hearing.

In deciding to revoke an insurance producer's license the Division looks to SDCL 58-33-68 for guidance. SDCL 58-33-68 is set forth below:

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.

In addition, the Division will consider SDCL 58-30-167 (shown in pertinent part) as follows:

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:...

(13) Failing to comply with an administrative or court order imposing a child support obligation.

Applying the law to the Findings of Fact it is clear that the South Dakota Resident Insurance Producer License of John Fischer 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 Division of Insurance bears the burden of establishing the alleged statutory violations by clear and convincing evidence.

III.

The Division of Insurance established by clear and convincing evidence that John Fischer violated SDCL 58-30-167(13).

IV.

The Division of Insurance established by clear and convincing evidence that the South Dakota Resident Insurance Producers License of John Fischer is subject to revocation.

V.

The Division of Insurance established by clear and convincing evidence that the South Dakota Resident Insurance Producers License of John Fischer should be revoked.

VI.

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

VII.

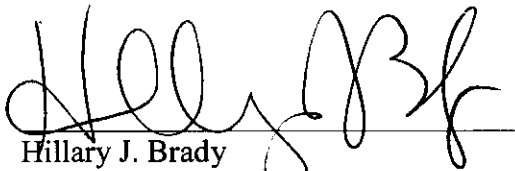
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

PROPOSED DECISION

The South Dakota Resident Insurance Producers License of John Fischer should be revoked.

Dated this 19th day of July 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