

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

**IN THE MATTER OF
MARY KAY ELSNER,
LICENSEE**

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**FINAL DECISION
INS 17-02**

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 Proposed Findings of Fact, Conclusions of Law and Proposed Order, dated March 23, 2017, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of Mary Kay Elsner 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 21 day of April, 2017.



Marcia Hultman, Cabinet Secretary
South Dakota Department of Labor and Regulation
123 W Missouri Avenue
Pierre, SD 57501

STATE OF SOUTH DAKOTA
DEPARTMENT OF LABOR AND REGULATION

IN THE MATTER OF
MARY KAY ELSNER,

INS 17-02

NOTICE OF ENTRY OF PROPOSED
FINDINGS OF FACT, CONCLUSION OF LAW,
AND DECISION AND FINAL DECISION

NOTICE IS HEREBY GIVEN, that attached hereto, is a true and correct copy of the Proposed Findings of Fact, Conclusions of Law, and Decision, and Final Decision entered by Marcia Hultman, Secretary of the South Dakota Department of Labor and Regulation, on April 21, 2017.

Dated this 5th day of May, 2017.



Mallori M.E. Barnett
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South Dakota Division of Insurance
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(605) 773-3563

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

**IN THE MATTER OF
MARY KAY ELSNER**

**INS 17-02
PROPOSED DECISION**

This matter came for hearing before the Office of Hearing Examiners on March 23, 2017, pursuant to a Notice of Hearing issued by the South Dakota Division of Insurance ("Division") on February 23, 2017. Mallori Barnett appeared as counsel for the Division. MARY KAY ELSNER did not appear, either in person or through counsel. The Division admitted its Exhibits 1 through 6 into evidence and moved that the Hearing Examiner enter these Proposed Findings of Fact, Conclusions of Law, and Proposed Decision as a default disposition to this contested case.

ISSUE

Whether the Non-Resident Insurance Producer License of MARY KAY ELSNER should be revoked for failing to timely report an administrative action(s) to the Division; for violating any insurance laws; for demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere; failing to respond to the Division's requests; and for having a revocation or suspension action(s) in another state(s) in violation of SDCL 58-30-167(2), (8), and (9), 58-30-193, 58-33-66, and 58-33-68.

FINDINGS OF FACT

1. MARY KAY ELSNER was licensed by the Division as an insurance producer on August 20, 2014. The license is currently inactive. (Exhibit 1).
2. MARY KAY ELSNER was the subject of an administrative action in another jurisdiction. (Exhibit 2).
3. MARY KAY ELSNER had her insurance license denied by the state of California. (Exhibit 2).
4. MARY KAY ELSNER did not report the administrative action to the Division.
5. The Division sent inquiries to MARY KAY ELSNER at her address regarding the licensure matters. (Exhibits 3 through 6).
6. MARY KAY ELSNER did not respond to the Division's inquiries. (Exhibits 3 through 6).
7. Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.

SCANNED

8. 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 to revoke the South Dakota Non-Resident Insurance Producer's License of MARY KAY ELSNER. As a consequence of the potential loss of Respondent'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).

SDCL 58-30-193 states that "[A]n insurance producer shall report to the director any administrative action taken against the insurance producer in another jurisdiction... within thirty days of the final disposition of the matter. This report shall include a copy of the order, consent order, or other relevant legal documents." SDCL 58-33-66(1) requires MARY KAY ELSNER to respond to the Division and supply requested documents within twenty days from the receipt of a request. In addition, the Division considers SDCL 58-30-167 (shown in pertinent part) as follows:

The director may... revoke or refuse to continue, any license issued under this chapter... after a hearing... The director may... revoke... an insurance producer's license... 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;
- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere;
- (9) Having an insurance producer license, or its equivalent, denied, suspended, or revoked in any other state, province, district, or territory;

The evidence indicates that MARY KAY ELSNER violated the insurance laws of another jurisdiction, failed to report that action, and failed to respond to the Division inquiries regarding the action. Applying the law to the Findings of Fact it is clear the Non-Resident

Insurance Producer License of MARY KAY ELSNER is subject to revocation and should be revoked.

CONCLUSIONS OF LAW

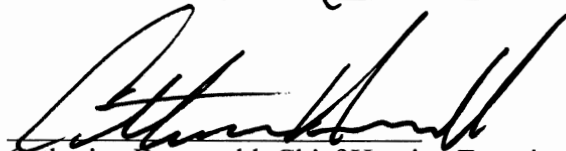
1. The Division has jurisdiction over MARY KAY ELSNER and the subject matter of this contested case. The Office of Hearing Examiners is authorized to conduct the hearing and issue a proposed decision pursuant to SDCL 1-26D-4.
2. The Division bears the burden of establishing the alleged statutory violations by clear and convincing evidence.
3. The Division established by clear and convincing evidence that MARY KAY ELSNER violated SDCL § 58-30-193.
4. The Division established by clear and convincing evidence that MARY KAY ELSNER violated SDCL § 58-33-66.
5. The Division established by clear and convincing evidence that the South Dakota Non-Resident Insurance Producer License of MARY KAY ELSNER is subject to revocation.
6. The Division may revoke or impose any penalty against a person who violates Title 58, even if the person's license or registration has been surrendered or has lapsed by operation of law pursuant to SDCL § 58-30-170.
7. Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.
8. 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 Insurance Producer License of MARY KAY ELSNER should be revoked.

Dated this 23rd day of March, 2017.



Catherine Duenwald, Chief Hearing Examiner
Office of Hearing Examiners
523 East Capitol
Pierre, SD 57501