

SOUTH DAKOTA
DEPARTMENT OF LABOR AND REGULATION
OFFICE OF THE SECRETARY

IN THE MATTER OF
MARK PATRICK SANTOS
LICENSEE

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FINAL DECISION
INS 12-09

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 18, 2012, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Nonresident Insurance Producer License of Mark Patrick Santos 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
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
MARK PATRICK SANTOS**

**PROPOSED ORDER
DLR/INSURANCE 12-09**

An administrative hearing in the above matter was held on April 24, 2012. Mark Patrick Santos (hereinafter sometimes referred to as "Santos" or "Licensee") failed to appear. Amber L. 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 Non-Resident Insurance Producer License of Mark Patrick Santos should be revoked due to his failure to respond in a timely manner to the South Dakota Division of Insurance inquiries dated December 9, 2011 and January 10, 2012 and for his failure to report an administrative action in another jurisdiction (Kansas). (SDCL 58-30-193, SDCL 58-33-66(1) and SDCL 58-30-167(2).

FINDINGS OF FACT

I.

Mark Patrick Santos possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Santos became licensed in the State of South Dakota on June 20, 2006. His license is scheduled to expire on March 31, 2013. (EX 1)

II.

Gretchen Brodkorb, Compliance Specialist for the South Dakota Division of Insurance for approximately six years, obtained information within the course of her duties that Mr. Santos had administrative actions taken against his insurance license in Kansas.

III.

The initial administrative action involved his failure to pay a monetary penalty (\$100) assessed for failure to file an annual statement. The Summary Order from that action was signed July 11, 2011 and became final on July 29, 2011. (EX 2)

IV.

A second Summary Order dated September 23, 2011 involving Santos was issued by the Kansas Commissioner of Insurance. This Order revoked the Kansas Non-resident Agent's License of

Santos due to failure to pay the penalty assessed in the July 2011 Order and for failing to file the annual statement by the 2010 deadline. (EX 6) The Order became final as of October 18, 2011. (EX 6)

V.

Ms. Brodkorb wrote Santos a letter on December 9, 2011 inquiring about the Kansas actions. (EX 3) He was given twenty days upon receipt of the letter to respond. The December 9, 2011 letter was mailed via first class mail to Santos at 1603 Gardenia Drive, Houston, TX 77018-5105. (EX 3) This was the address listed on Santo's Individual Information Inquiry on file with the Division. (EX 1) Ms. Brodkorb received no response.

VI.

Ms. Brodkorb sent Santos a certified cite letter on January 10, 2012. (EX 4) This letter was sent via certified mail to 1603 Gardenia Drive, Houston, TX 77018-5105. The letter was also sent via first class mail to 840 Gessner Rd. Ste. 600, Houston, TX 77024-4145. (EX 4) Ms. Brodkorb received no response. The certified letter was returned unclaimed. (EX 5)

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 Nonresident Insurance Producer's License of Mark Patrick Santos. 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. Santos did not appear at the hearing.

Gretchen Brodkorb, compliance specialist for the South Dakota Division of Insurance, found that Mark Patrick Santos had administrative actions in Kansas which were not reported to the division. (The specifics regarding the Kansas administrative actions are contained in Exhibits 2 and 6.) Furthermore, Santos failed to respond in a timely fashion to inquiry made by the Division (letters dated December 9, 2011 and January 10, 2012) about the administrative action 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;...

Furthermore, pursuant to SDCL 58-30-193, "[A]n insurance producer **shall** report to the director any administrative action taken against the insurance producer in another jurisdiction or by another governmental agency in this state 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." Santos did not do this. The word "shall" in our statutes "manifests a mandatory directive," conferring no discretion. SDCL 2-14-2.1. Furthermore, the term "shall" does not allow for discretion. The Supreme Court has repeatedly stated that: "When 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." Full House, Inc. v. Stell, 2002 SD 14; 640 N.W.2d 61; 2002 S.D. Lexis 14 citing to Fritz v. Howard Township, 1997 SD 122, P15, 570 N.W.2d 240, 242 (citing In re Groseth Int'l, Inc., {640 N.W.2d 68} 442 N.W.2d 229, 231-32 (SD 1989)).

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 Non-Resident Insurance Producer License of Mark Patrick Santos 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 March 20, 2012 by the South Dakota Division of Insurance.

III.

Neither Mark Patrick Santos nor anyone on his behalf 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 Mark Patrick Santos 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 the South Dakota Nonresident Insurance Producers License of Mark Patrick Santos is subject to revocation pursuant to SDCL 58-30-167(2).

VII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Nonresident Insurance Producers License of Mark Patrick Santos should be revoked.

VIII.

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

IX.

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 Nonresident Insurance Producers License of Mark Patrick Santos should be revoked.

Dated this 18th day of July 2012



Hillary J. Brady
Office of Hearing Examiners
210 E. 4th Street
Pierre, South Dakota 57501-1538