

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

**IN THE MATTER OF
JUAN GIL,
LICENSEE**

)
) **FINAL DECISION**
) **INS 13-29**

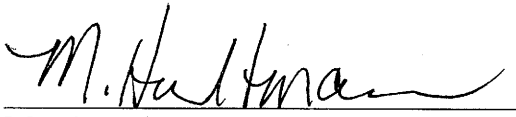
After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-4, the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Proposed Order, dated November 6, 2013, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of Juan Gil 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 14 day of November 2013



Marcia Hultman, Interim 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
JUAN GIL**

**PROPOSED ORDER
INSURANCE 13-29**

An administrative hearing in the above matter was held on September 16, 2013. Juan Gil (hereinafter sometimes referred to as "Gil" or "Licensee") failed to appear. Frank Marnell appeared as counsel for the South Dakota 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 4 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non-Resident Insurance Producer's License of Juan Gil should be revoked due to his failure to respond in a timely manner to the South Dakota Division of Insurance inquiries dated March 14, 2013 and April 18, 2013 and his failure to report an administrative action in another jurisdiction (Arizona) to the Division. (SDCL 58-30-167(2), SDCL 58-33-66(1), 58-30-193)

FINDINGS OF FACT

I.

Juan Michael Gil possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Gil originally became licensed in the State of South Dakota on April 10, 2003. His license is scheduled to expire on July 31, 2014. (EX 1)

II.

Gretchen Brodkorb, Compliance Specialist for the South Dakota Division of Insurance, obtained information, within the course of her duties, that Mr. Gil had an administrative action taken against his license in Arizona. By statute this was to be reported to the South Dakota Division of Insurance within thirty (30) days.

III.

The Arizona administrative action resulted from Gil conduct which constituted failure to be currently licensed and in good standing in his home state for his credit, property and casualty lines of authority. This action was resolved by Gil entering into a Consent Order with the Director of Insurance for the State of Arizona. The Consent Order was signed by Gil on January 15, 2013. (EX 4)

IV.

Ms. Brodkorb wrote Mr. Gil a letter on March 14, 2013 inquiring about the Arizona administrative action. (EX 2) The licensee was given twenty days upon receipt of the letter to respond to the Division. The letter was mailed via first class mail to Gil in care of Humana, 3501 SW 160th Avenue, Floor 3, Miramar, Florida 33027-4695. (EX 2) This was the address listed on Gil's Individual Information Inquiry on file with the Division. (EX 1) Mr. Gil did not contact Ms. Brodkorb.

V.

Ms. Brodkorb sent Mr. Gil another letter on April 18, 2013 once again inquiring about the Arizona action and explaining that Gil had failed to supply requested documents to the Division within 20 days of receipt of the first letter. (EX 3-A) He was again given twenty days upon receipt of the letter to respond. He was also informed that this second letter served as official notice pursuant to SDCL 58-33-68 that he was in violation of SDCL 58-33-66(1). This letter was sent via first class mail and certified mail to Gil at Humana, 3501 SW 160th Avenue, Floor 3, Miramar, Florida 33027-4695 (via certified mail) and to Gil at 15220 NW 6th Court, Pembroke Pines, FL 33028 (via 1st class mail). (EX 3-A) Ms. Brodkorb received no response.

VI.

The letter sent via certified mail was returned to the division stamped RETURN TO SENDER, REFUSED, UNABLE TO FORWARD. (EX 3-B)

VII.

As if the time of the hearing the Division had not received any communication from Gil.

VIII.

Any additional Findings of Fact 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, 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 Juan Michael Gil. 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. Gil did not appear at the hearing.

Gretchen Brodkorb, compliance specialist for the South Dakota Division of Insurance, found that Mr. Gil had an administrative action in Arizona which was not reported to the South Dakota Division of Insurance. (The specifics regarding the Washington administrative action that were made available to this examiner are contained in Exhibit 4.) Furthermore, Gil failed to respond in a timely fashion, in violation of SDCL 58-33-66(1), to inquiries made by the Division (letters dated March 14, 2013 and April 18, 2013 about the administrative action. SDCL 58-33-66(1), 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;...

In addition Mr. Gil violated SDCL 58-30-193. That statute reads as follows:

58-30-193. Report by insurance producer of any administrative action taken against insurance producer. An 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. (emphasis added)

Mr. Gil did not report the Arizona action in a timely fashion to the Division. The word "shall" in our statutes "manifests a mandatory directive," conferring no discretion. SDCL 2-14-2.1. 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. Mr. Gil violated subsection (2) of SDCL 58-30-167 which is set forth 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 Juan Michael Gil 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 August 5, 2013 by the South Dakota Division of Insurance.

III.

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

IV.

Pursuant to SDCL58-33-68 the Division has shown that Mr. Gil has been notified of the violation and refused to take corrective action to remedy the situation.

V.

The Division of Insurance established by clear and convincing evidence that Juan Michael Gil 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 Juan Michael Gil violated SDCL 58-30-193.

VII.

The Division of Insurance established by clear and convincing evidence Juan Michael Gil that the South Dakota Nonresident Insurance Producers License of is subject to revocation pursuant to SDCL 58-30-167(2).

VIII.

The Division of Insurance established by clear and convincing evidence that the South Dakota Nonresident Insurance Producers License of Juan Michael Gil should be revoked.

IX.

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

X.

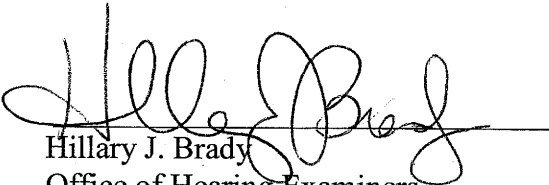
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

PROPOSED ORDER

The South Dakota Nonresident Insurance Producers License of Juan Michael Gil should be revoked.

Dated this 6th day of November 2013



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

CERTIFICATE OF SERVICE

I certify that on November 6, 2013, at Pierre, South Dakota, a true and correct copy of this Proposed Order was mailed to each of the parties listed below.



Ashley Couillard

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PEMBROKE PINES FL 33028