

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

**IN THE MATTER OF
JOSHUA KIM**

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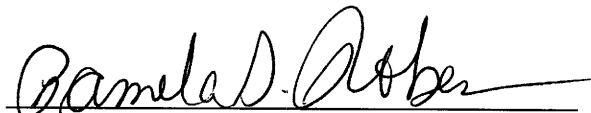
**FINAL DECISION
INS 13-02**

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 July 1, 2013, is adopted in full.

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 29th day of July, 2013.



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
JOSHUA KIM**

**PROPOSED ORDER
INSURANCE 13-11**

An administrative hearing in the above matter was held on May 2, 2013. Joshua Kim (hereinafter sometimes referred to as "Kim" or "Licensee") failed to appear. Mallori Barnett 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 7 were admitted and will be denoted by EX followed by the appropriate number.

ISSUE

Whether the Non Resident Insurance Producer's License of Joshua Kim should be revoked due to his failure to respond in a timely manner to the South Dakota Division of Insurance inquiries dated August 14, 2012, August 27, 2012 and September 26, 2012, for his failure to update the Division of his change of address and for his failure to report an administrative action in another jurisdiction (Virginia). (SDCL 58-30-193, SDCL 58-33-66(1) and SDCL 58-30-157.)

FINDINGS OF FACT

I.

Joshua Kim possesses an active Non-Resident Insurance Producer License from the State of South Dakota. Kim became licensed in the State of South Dakota on December 27, 2007. His license is scheduled to expire on July 31, 2013. (EX 1)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance, obtained information within the course of her duties that Mr. Kim had an administrative action taken against his insurance license in Virginia.

III.

The Virginia administrative action involved the revocation of Kim's license for his failure to pay the Bureau of Insurance Maintenance Assessment, Premium License Tax and other related fines and penalties for the calendar year 2011. (EX 7)

IV.

The Order Revoking License from the Virginia action was dated June 26, 2012. (EX 7)

V.

Ms. Lang wrote Kim a letter on August 14, 2012 inquiring about the Virginia action. (EX 2) He was given twenty days upon receipt of the letter to respond to the Division. The letter was mailed via first class mail to Kim at 2579 S. Truckee Way, Aurora, CO 80013-5925. (EX 2) This was the address listed on Kim's Individual Information Inquiry on file with the Division. (EX 1) Ms. Lang received no response.

VI.

Ms. Lang sent Kim another letter on August 27, 2012 once again inquiring about the Virginia action. (EX 3) He was again given twenty days upon receipt of the letter to respond. The letter was mailed via first class mail to Kim at 19797 E. Ida Pl., Aurora, CO 80013-5925. A copy of the letter was also sent to the Truckee Way address that was listed on Kim's Individual Information Inquiry. (EX 1 & 3)

VII.

Ms. Lang mailed a certified cite letter to Kim on September 26, 2012. (EX 4) This letter was sent via certified mail to the Truckee Way address. A copy of the letter was also mailed via first class mail to the Ida Place address. (EX 4) The certified letter was delivered. (EX 5) Ms. Lang received no response.

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 Joshua Kim. 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. Kim did not appear at the hearing.

Heather Lang, compliance agent for the South Dakota Division of Insurance, found that Joshua Kim had an administrative action in Virginia which was not reported to the South Dakota Division of Insurance. (The specifics regarding the Virginia administrative action are contained in Exhibit 7) Furthermore, Kim failed to respond in a timely fashion, in violation of SDCL 58-33-66(1), to inquiries made by the Division (letters dated August 14, 2012, August 27, 2012 and September 26, 2012) 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;...

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. 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)).

SDCL 58-30-157 states 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.” Kim did not inform the Division of his change of address.

In deciding to revoke an insurance producer’s license 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 Joshua Kim 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 April 5, 2013 by the South Dakota Division of Insurance.

III.

Neither Joshua Kim 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 Joshua Kim 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 Joshua Kim did not keep the Division supplied with current address information in violation of SDCL §58-30-157.

VII.

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

IX.

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

X.

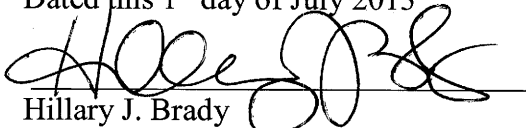
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

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

PROPOSED DECISION

The South Dakota Nonresident Insurance Producers License of Joshua Kim should be revoked.

Dated this 1st day of July 2013



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