

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

**IN THE MATTER OF  
AMBER SMITHEY**

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**FINAL DECISION  
INS 24-033**


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 August 20, 2024, is adopted in full.

IT IS FURTHER ORDERED that the South Dakota Non-resident Insurance Producer License of the respondent 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 3 day of <sup>Sept</sup> August, 2024.

  
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Marcia Hultman, Secretary  
South Dakota Department of Labor and Regulation  
700 Governors Drive  
Pierre, SD 57501

STATE OF SOUTH DAKOTA  
DEPARTMENT OF LABOR AND REGULATION

IN THE MATTER OF  
AMBER SMITHEY

INS 24-033  
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 September 3, 2024.

Dated this 5<sup>th</sup> day of September, 2024.



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Callie A. Pospishil  
Legal Counsel  
South Dakota Division of Insurance  
124 S. Euclid Ave., 2<sup>nd</sup> Floor  
Pierre, SD 57501  
(605) 773-3563

**CERTIFICATE OF SERVICE**

I, Callie Pospishil, the undersigned, do hereby certify that on the date shown below, a true and correct copy of the Proposed Findings of Fact, Conclusions of Law, and Decision, and Final Decision with respect to the above-entitled action was sent U.S. Certified Mail, U.S. First Class Mail, and electronic mail thereon, to the following:

AMBER SMITHEY  
4720 W Davis ST  
Bremerton, WA 98312

Dated this 5<sup>th</sup> day of September, 2024 in Pierre, South Dakota.



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Callie A. Pospishil  
Legal Counsel  
South Dakota Division of Insurance  
124 S. Euclid Ave., 2<sup>nd</sup> Floor  
Pierre, SD 57501  
(605) 773-3563

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

**IN THE MATTER OF  
AMBER SMITHEY**

**INS 24-033  
PROPOSED DECISION**

This matter came for hearing before the Office of Hearing Examiners on August 13, 2024, pursuant to a Notice of Hearing issued by the South Dakota Division of Insurance (“Division”) on July 10, 2024. Callie A. Pospishil appeared as counsel for the Division. AMBER SMITHEY (“SMITHEY”), did not appear, either in person or through counsel. The Division admitted its Exhibits 1 through 5 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 SMITHEY should be revoked due to violating the insurance laws of another state; intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance; having admitted or been found to have committed any insurance unfair trade practice or fraud; using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere; knowingly making a false or fraudulent statement or representation with reference to an application for insurance; and failing to respond to the Divisions inquiries, in violation of SDCL 58-30-167(2), (5), (7) & (8), 58-33-37, and 58-33-66(1).

**FINDINGS OF FACT**

1. SMITHEY is licensed by the Division as an insurance producer on August 3, 2024. The license is currently active. (Exhibit 1).
2. SMITHEY's insurance appointment was terminated for cause from an insurer for submitting invoices for services not provided to her pet. (Exhibits 2 and 3).
3. The Division sent inquiries to SMITHEY January 2, 2024, and February 2, 2024, at the address of record regarding the licensure matters. (Exhibits 4 and 5).
4. SMITHEY did not provide a complete response to the Division's inquiries.
5. Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.
6. 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 SMITHEY. 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 58-33-37 states that "Any person who knowingly makes any false or fraudulent statement or representation with reference to any application for insurance is guilty of a Class 1 misdemeanor." SDCL 58-33-66(1) requires SMITHEY to respond to the Division and supply requested documents within twenty days from the receipt of a request. Also, 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;
- (5) Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;
- (7) Having admitted or been found to have committed any insurance unfair trade practice or fraud;
- (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere;

The evidence indicates that SMITHEY violated the insurance laws of another state; intentionally misrepresented the terms of an actual or proposed insurance contract or application for insurance; having admitted or been found to have committed an insurance unfair trade practice or fraud; used fraudulent, coercive, or dishonest practices, or demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere; knowingly made a false or fraudulent statement or representation with reference to an application for insurance; and failed to respond to the Divisions inquiries. Applying the law to the Findings of Fact, it is clear the Non-Resident Insurance Producer License of SMITHEY is subject to revocation and should be revoked.

## CONCLUSIONS OF LAW

1. The Division has jurisdiction over SMITHEY 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 SMITHEY violated SDCL 58-33-37.
4. The Division established by clear and convincing evidence that SMITHEY violated SDCL 58-33-66.
5. The Division established by clear and convincing evidence that the South Dakota Non-Resident Insurance Producer License SMITHEY is subject to revocation pursuant to SDCL 58-30-167(2), (5), (7) and (8).
6. Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.
7. 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 SMITHEY should be revoked.

Dated this 20<sup>th</sup> day of August, 2024.



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

**CERTIFICATE OF SERVICE**

I certify on August 20, 2024, at Pierre, South Dakota, a true and correct copy of this Proposed Decision was mailed to each of the parties below.



Julie McClelland  
Office of Hearing Examiners

AMBER SMITHEY  
4720 W. Davis St.  
Bremerton, WA 98312

Callie A. Pospishil  
Division of Insurance  
124 S. Euclid Ave., 2<sup>nd</sup> Floor  
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