

transcript, attached in relevant part hereto as Staff's Exhibit F², are referenced as "CM". All cites to transcripts are followed by the appropriate page number.

II. Statement of Facts

Anderson Seed became licensed as a grain buyer in the State of South Dakota in October of 2010. Anderson Seed renewed its license on July 1, 2011, for the period July 1, 2011, through June 30, 2012. Anderson Seed did business in South Dakota until their license was suspended on February 17, 2012, due to the company's insolvency. The license was ultimately revoked on March 15, 2012. (Staff's Exhibit E) Anderson Seed had facilities in Redfield, South Dakota; Durbin, North Dakota; Selz, North Dakota; and Mentor, Minnesota. (Affidavit of James Mehlhaff, attached hereto as Staff's Exhibit G)

Pursuant to SDCL 49-45-9, grain buyers in South Dakota are required to be bonded for an amount determined by their projected purchases. At the time of its insolvency, Anderson Seed was bonded for One Hundred Thousand Dollars (\$100,000.00). (HT 26:17-22) The Commission sought receivership of the bond in this court and was appointed as receiver on May 1, 2012.

As receiver, the Commission determined which sellers had valid claims for unpaid grain deliveries to Anderson Seed. On June 29, 2012, Commission Staff ("Staff") sent a letter to all known patrons of Anderson Seed informing patrons of their rights and providing a claim form for those who had not been paid for grain delivered. (Staff's Exhibit E) The letter directed potential claimants to return the claim form no later than September 18, 2012. The letter also stated that claimants should include verification of the amount claimed in order to substantiate

² The complete transcript of the January 15, 2013, Commission Meeting is available on the Commission's website, <http://www.puc.sd.gov/commission/minutes/2013/transcript/011813transcriptgw12-002.pdf>.

the claim. The Commission received a claim from CHS on or about September 17, 2012.

(Staff's Exhibit G) CHS submitted a claim for \$687,117.59. Staff found CHS had a valid claim for \$319,684.44. (Staff's Exhibit C)

Claim forms received by the Commission were evaluated by Staff. (HT 27-28) Staff conducted a scale ticket audit of Anderson Seed and measured the claims against the information received in that audit. (HT 27:17-24) Staff performed the scale ticket audit by going to the Anderson Seed facility in Redfield, South Dakota, taking copies of all of the contract files and scale tickets that were on the premises, and obtaining information from Anderson Seed's attorneys. (HT 27:17-24) Any discrepancies between the information obtained through Staff's audit and information received from claimants was analyzed. Staff determined that scale tickets provided the most accurate claim amount. (HT 28:11-12)

After analyzing the claims, Staff determined how much was owed by Anderson Seed to each claimant and sent letters explaining how the amount was determined. (HT 27-28) The letters were sent to each claimant on October 9, 2012. (Staff's Exhibit C) Claimants who wished to challenge Staff's findings were directed to submit a written request for a hearing no later than November 16, 2012. Only one such request was received. (CM 14:1-2) Martinmaas Dairy requested a hearing. CHS did not indicate prior to November 16, 2012, that it wished to contest Staff's findings. (CM 13-14)

On January 9, 2013, a letter was sent to all claimants providing notice that the Commission would issue a decision on January 15, 2013, on Receiver's recommendation for the disbursement of the bond proceeds (Staff's Exhibit D). On January 15, 2013, Staff first received notice that CHS wished to challenge Staff's findings. (CM 18:20) At the regularly scheduled Commission Meeting on January 15, 2013, the Commission considered the appropriate

disbursement of the bond proceeds. (CM 22-23) At that time, an attorney appeared via telephone on behalf of CHS to dispute Staff's findings. (CM 17-18) Commission Staff appeared and explained that the reason for denial of the CHS's contested amount was that CHS claimed amounts for grain accounted for only on trucking contracts which did not have a specified place of delivery. (CM 19:2-15) Other than two of these trucker contracts submitted with CHS's original claim and determined by Staff to have been deliveries to Anderson in Redfield, none of the other trucker contracts were matched by a scale ticket, assembly sheet, or other record of delivery at Anderson Redfield.

After hearing statements from both Staff and CHS, the Commission issued a decision to adopt Staff's findings. (CM 20-21)

III. CHS Failed to Timely and Properly Object to Staff's Findings

CHS asserts that it objected to the determination of Receiver. However, a letter was sent to all claimants on October 9, 2012, detailing Staff's recommendation and informing claimants that if they wished to challenge Staff's findings, a written request for a hearing must be sent to the Public Utilities Commission by November 16, 2012. The letter sent to CHS is attached hereto as Staff's Exhibit C. The Commission did not receive a request for hearing from CHS, nor did CHS indicate in any way prior to November 16, 2012, that it was not satisfied with Staff's findings.

On January 9, 2013, a letter was sent to all claimants providing notice that the Commission would issue a decision on January 15, 2013, on Receiver's recommendation for the disbursement of the bond proceeds (Staff's Exhibit D). It was not until January 15, 2013, the day the Commission was to issue its decision, that CHS filed an objection to Staff's findings disallowing \$124,182.75 of CHS's claim.

Because CHS failed to follow proper procedure and request a hearing by the date set by the Commission, Receiver contends that it would be prejudicial to allow CHS to present new evidence and argument before this Honorable Court. There is a finite amount of bond proceeds to be disbursed and each of the other claimants would be injured if CHS was allowed to collect an additional amount of money without the scrutiny that would have been afforded by a hearing if one had been requested prior to the November 16, 2012, deadline. Therefore, Receiver respectfully requests the objection of CHS be overruled and the recommendation of Receiver be approved.

IV. CHS has Provided No Evidence to Substantiate Its Claim

In addition to failing to follow proper procedure before the Commission, CHS has not provided any evidence to substantiate its claim. In its objection, CHS states that it is owed \$443,867.19, which is \$124,182.75 beyond the determination of Receiver. CHS attached no documentation or exhibits upon which this court could rely.

However, even if CHS were to rely on exhibits filed with the Commission on January 15, 2013, it is impossible to determine that CHS has a claim for amounts beyond that accepted by Receiver. On that date, CHS submitted trucking contracts for amounts which Staff concluded CHS did not have a valid claim. Those trucking contracts listed only an elevator of origin, trucking company, and a destination to Anderson Seed. The trucking contracts did not list an address of delivery, however, in the notes section of the six disputed shipping contracts, scale ticket numbers have been written in. These scale ticket numbers do not fit in with the series of tickets that were issued by the Anderson Seed Redfield facility. Because Anderson Seed had locations outside of South Dakota, the evidence submitted by CHS supports Staff's

determination that the disputed loads were in fact delivered to facilities located out of state. Sales outside of South Dakota are not covered by the bond.

Along with the trucking contracts, CHS submitted a spread sheet listing all sales to Anderson Seed. This spreadsheet did not provide any information to suggest that any of the deliveries were made to Redfield.

Finally, in a letter to the Commission, dated January 14, 2013, and in statements made to the Commission, CHS stated that it believed the grain in question was delivered to Redfield "based on the location of the truckers" with whom CHS had trucking contracts. Staff analyzed the eight trucking contracts provided to the Commission. Two of the trucking contracts were with Barbee Trucking. Staff determined that Barbee Trucking is located in Redfield, South Dakota. Staff also determined that CHS had been given credit for those deliveries in the claim amount approved by Staff. Staff also found scale tickets from the Redfield facility to verify those deliveries. One trucking contract was with "Sorby". Staff was unable to identify the location of this company, however, the contract states that the truck license was from Minnesota. Staff did not find any scale tickets at the Redfield facility to verify this delivery. Four of the contracts were with Schmidt & Sons. Staff determined that this trucking company is located in Kindred, North Dakota, approximately 20 miles from Anderson Seed's Durbin, North Dakota facility. Staff found no scale tickets at the Redfield facility to indicate these shipments had been delivered to Redfield. One contract was with Bob-O Express, located in Larimore, North Dakota, approximately 80 miles from Anderson Seed's facility in Mentor, Minnesota. Staff found no scale tickets from the Redfield facility corresponding with this alleged delivery. Based upon this information, it is more likely that the contracts upon which CHS relies corresponded to deliveries outside of South Dakota rather than to the Anderson Seed facility in Redfield.

V. CHS Failed to Properly Serve Its Objection on All Interest Parties

SDCL 15-6-5(a) provides:

Except as otherwise provided in this chapter, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer or judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in § 15-6-4.

All claimants to the bond proceeds are parties to this action. Therefore, service is required on each party having made a claim to the proceeds and should have been served in order for the objection to be properly before this court. Therefore, Receiver would submit that, because CHS served only the Commission and attorneys for Anderson Seed, the objection is improper.

VI. The Objection was not Submitted by an Attorney Licensed to Practice in South

Dakota

SDCL 16-16-1 provides in relevant part:

No person, except as provided in § 16-18-2, may practice as an attorney and counselor at law in any court of record within this state, either by using or subscribing his or her own name or the name of any other person, without having previously obtained a license for that purpose from the Supreme Court of this state and having become an active member in good standing of the State Bar of South Dakota.

To Receiver's knowledge the attorney for CHS, Jon Brakke, Vogel Law Firm, Fargo North Dakota, is not licensed to practice law in the State of South Dakota. Receiver is also unaware that Mr. Brakke has been admitted practice Pro Hac Vice, pursuant to SDCL 16-18-2, for the purposes of this proceeding. Therefore, the Objection has not been properly filed and should be overruled.

VII. Conclusion

SDCL 1-26-36 provides:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:


- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The Commission provided ample time and notice for claimants to dispute Staff's findings. CHS did not do so. Furthermore, the Commission based its decision on sound evidence, and CHS provided no evidence upon which the Commission could reach a different conclusion.

For the above-mentioned reasons, Receiver respectfully requests the CHS's objection be denied and the requests this honorable court issue an order adopting the decision of Receiver.

Dated this 12th day of March, 2013.



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