

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE  
PETROLEUM TANK RELEASE COMPENSATION BOARD

In the Matter of G.H. Holdings, LLC

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION**

This matter originally came before Administrative Law Judge Ann O'Reilly on the Notice and Order for Hearing and Prehearing Conference dated September 13, 2012.

On January 2, 2013, the Minnesota Petroleum Tank Release Compensation Board (Board) served and filed a Notice of Motion and Motion for Summary Disposition (Motion). Appellant G.H. Holdings, Inc. (Appellant) did not respond to the Summary Disposition Motion and instead filed a Motion to Stay the Proceedings pending an interlocutory appeal to the Minnesota Court of Appeals regarding the scope of evidence that may be considered in the administrative hearing.

Appellant's Motion to Stay was granted and this administrative action was stayed until a decision was issued by the Minnesota Court of Appeals on December 23, 2013.<sup>1</sup>

The parties appeared for a Third Prehearing Conference on February 24, 2014. Michael Tostengard, Assistant Attorney General, appeared on behalf of the Board. Daniel W. Voss, the Law Offices of Daniel W. Voss, PLLC, appeared on behalf of Appellant G.H. Holdings, LLC.

At the Third Prehearing Conference, the Board renewed its Motion for Summary Disposition and the parties agreed to a briefing schedule. According to the Third Prehearing Order dated February 27, 2014, Appellant was required to file its response to the Motion for Summary Disposition by June 20, 2014, and a hearing on the Motion was scheduled for July 11, 2014, at 9:30 a.m., at the Office of Administrative Hearings.

On May 12, 2014, Appellant's attorney withdrew as counsel by filing a Notice of Withdrawal. Appellant did not file a response to the Motion for Summary Disposition and did not appear at the Motion hearing on July 11, 2014. The hearing record closed on July 11, 2014, at the conclusion of the Motion hearing.

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<sup>1</sup> *GH Holdings, LLC v. Minnesota Department of Commerce*, 840 N.W.2d 838 (Minn. Ct. App. 2013).

## STATEMENT OF THE ISSUES

Is the Appellant entitled to reimbursement for the cost of corrective action incurred as a result of a petroleum tank release, pursuant to Minn. Stat. § 115C.09 (2010) and Minn. R. ch. 2890 (2010)?<sup>2</sup>

Based upon the record of the proceedings, memoranda and files herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### RECOMMENDATION

#### IT IS RESPECTFULLY RECOMMENDED THAT:

1. The Board's Motion for Summary Disposition be **GRANTED**.
2. The Board's denial of the Appellant's request for reimbursement be **UPHELD**.

Dated: August 13, 2014

s/Ann O'Reilly

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ANN O'REILLY  
Administrative Law Judge

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<sup>2</sup> The 2010 version of the statutes and rules apply due to the date of the discovery of the release (May 2010).

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten (10) calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Heidi Retterath, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 539-1445, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten (10) working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

### I. Jurisdiction

The Administrative Law Judge and the Board have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 115C.12 (2010), and Minn. R. 2890.4600 (2010). Appellant was given notice of the Motion for Summary Disposition, and the Board has complied with all relevant procedural and statutory requirements.

### II. Factual Background

For purposes of the Board's Motion for Summary Disposition, the following facts have not been disputed and are, thus, deemed undisputed:

Appellant is the owner of real property located in Rochester, Minnesota (Property).<sup>3</sup> Appellant purchased the Property from the city of Rochester for purposes of redevelopment.<sup>4</sup> On May 20, 2010, during excavation of the Property, Appellant discovered an underground storage tank on the Property.<sup>5</sup> A second underground storage tank was discovered on May 27, 2010.<sup>6</sup> Appellant learned that the Property, which had been most recently used for restaurant, dance club, and retail/office use, was the site of a former gas station dating back to 1928.<sup>7</sup>

Appellant hired McGhie & Betts Environmental Services, Inc. to manage and inspect the removal of the tanks and the cleanup process, including the excavation and removal of contaminated soils.<sup>8</sup> Appellant incurred \$201,439.34 for the removal of 1,872 cubic yards of contaminated soil from the Property, as well as other remediation costs.<sup>9</sup> There is no evidence in the record that the MPCA ordered, required or approved the corrective action taken by Appellant.

On November 30, 2011, Appellant filed an application for reimbursement from the Petroleum Tank Release Cleanup Fund (Petrofund) for the costs of cleanup of the Property (\$201,439.34).<sup>10</sup> These costs include site investigation, remediation, contractor services, excavation and disposal of 1,872 cubic yards of contaminated soil, and related permits, utilities, and fees.<sup>11</sup>

Upon initial review of the Appellant's application for reimbursement on January 24, 2012, Michael Kanner, a Manager of the Petroleum Remediation Program Remediation Division, indicated that the "corrective action" described in Appellant's

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<sup>3</sup> Affidavit of Joel Fischer, Ex. 1 at 32, 45, 51, 53, 87-89.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 32, 45, 51, 53, 60, 69-72, 87-89.

<sup>6</sup> *Id.* at 87-89.

<sup>7</sup> *Id.* at 69-72.

<sup>8</sup> *Id.* at 69-72; 87-89.

<sup>9</sup> *Id.* at 87-388.

<sup>10</sup> Fischer Aff. at Para. 2, Ex. 1 at 27-22, 87-388.

<sup>11</sup> Fischer Aff., Ex. 1 at 87-388.

application was “appropriate in terms of protecting the public health, welfare, and the environment,” and that the Appellant was “eligible for Petrofund reimbursement” under Minn. Stat. § 115C.09, subd. 2a(d).<sup>12</sup> However, because Appellant failed to immediately notify the Minnesota Pollution Control Agency (MPCA) of the release, the MPCA staff recommended a \$200 reduction in the reimbursement amount.<sup>13</sup>

Upon receipt of Appellant’s application, Board Staff Analyst Colleen Schiltz undertook an investigation into the circumstances surrounding the excavation and disposal costs that were the subject of Appellant’s application.<sup>14</sup> As part of her investigation, Ms. Schiltz contacted Mark Koplitz of the MPCA.<sup>15</sup> Ms. Schiltz inquired whether any of the work was “eligible for corrective action” or whether it was performed as part of the redevelopment.<sup>16</sup> Mr. Koplitz responded that “No soil was approved for corrective action. I ordered the file, never received it and then forgot to follow up.”<sup>17</sup>

Based upon Mr. Koplitz’s response, Schiltz concluded that there was no documentation that the excavation and disposal of the contaminated soil was ordered or approved by the MPCA as necessary for “corrective action.”<sup>18</sup> Ms. Schiltz asserts that the costs were incurred as part of cleanup work performed under the Petroleum Brownfields Program.<sup>19</sup>

On January 27, 2012, Ms. Schiltz sent Appellant a letter advising Appellant that Board staff was not recommending approval of Appellant’s application for reimbursement.<sup>20</sup> The letter advised Appellant of its right to appeal and of a “May 9, 2012,” meeting of the Board in which Appellant’s application would be reviewed.<sup>21</sup>

On February 9, 2012, Appellant notified the Board that it was appealing the reimbursement determination.<sup>22</sup>

On February 24, 2012, Ms. Schiltz sent Appellant a second letter advising it that she received Appellant’s Notice of Appeal, and that Appellant’s application and appeal would be reviewed by the Board at its March 24, 2012 meeting.<sup>23</sup>

In a Memorandum to the Board, dated February 24, 2012, Ms. Schiltz explains:

The applicant requested reimbursement for \$201,439.34 in costs for consultant and contractor services associated with the excavation and

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<sup>12</sup> *Id.* at 28-29.

<sup>13</sup> *Id.*

<sup>14</sup> Fischer Aff., Ex. 1 at 79-85.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Fischer Aff. at Para. 4, Ex. 1 at 30, 31.

<sup>19</sup> *Id.*

<sup>20</sup> Fischer Aff., Ex. 1 at 31.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 32.

<sup>23</sup> *Id.* at 65.

disposal of 1,872 cubic yards of contaminated soil. The excavation of this soil was done as part of redeveloping the leaksite property. Reimbursement of these costs was denied because according to the Minnesota Pollution Control Agency project manager for this site, this work was not necessary for corrective action (as required by Minn. Rule 2890.0200), but rather was performed as part of work done for the Petroleum Brownfield Program.<sup>24</sup>

The Board considered Appellant's application for reimbursement at its meeting on March 14, 2012.<sup>25</sup> Appellant was not present at the meeting.<sup>26</sup> Based upon the recommendation of Ms. Schiltz, and the absence of any evidence from Appellant of corrective action required by the MPCA, the Board voted to deny Appellant's application and appeal.<sup>27</sup>

On March 20, 2012, Joel Fischer, Director of the Petroleum Tank Release Cleanup Fund, sent Appellant a letter advising it that the Board reviewed Appellant's application at its March 14, 2012 meeting and did not approve reimbursement for any of the costs requested.<sup>28</sup> The letter advised Appellant of its right to appeal the Board's determination under Minn. Stat. ch. 14.<sup>29</sup>

On April 12, 2012, Appellant sent a letter advising the Board of its appeal of the Board decision.<sup>30</sup> Appellant's notice of appeal was timely, pursuant to Minn. Stat. § 115C.12 (2010) and Minn. R. 2890.4600 (2010).

A Notice of and Order for Hearing and Prehearing Conference was served and filed on September 14, 2012.<sup>31</sup>

On January 2, 2013, the Board served and filed its Notice of Motion and Motion for Summary Disposition. Appellant did not respond to the Summary Disposition Motion and, instead, filed a Motion to Stay the Proceedings pending an interlocutory appeal to the Minnesota Court of Appeals regarding the scope of evidence that may be considered in the administrative hearing. Appellant's Motion to Stay was granted and this administrative action was stayed until a decision was issued by the Minnesota Court of Appeals on December 23, 2013.<sup>32</sup>

The decision by the Court of Appeals was not dispositive of the issues in this case. The issue on interlocutory appeal was the validity of Minn. R. 2890.4600,

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<sup>24</sup> *Id.* at 30.

<sup>25</sup> *Id.* at 47.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 36.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 51-54.

<sup>31</sup> See Notice of and Order for Hearing and Prehearing Conference, dated September 13, 2012, on file and of record in this matter.

<sup>32</sup> See Order Staying Proceedings dated February 16, 2013.

subp. 2A, which limits the evidence that may be considered by the Office of Administrative Hearings on an appeal from a denial of an application for reimbursement.<sup>33</sup> Minnesota Rules part 2890.4600, subpart 2A provides:

An applicant for reimbursement may appeal a reimbursement determination of the board as a contested case under Minnesota Statutes, chapter 14. An applicant for reimbursement must provide written notification to the board of a request for a contested case, setting forth the specific basis for the appeal, within 30 days of the date that the board makes a reimbursement determination. **On appeal, the Office of Administrative Hearings must determine whether the evidence submitted to the board entitles the applicant to reimbursement and whether the board's determination is otherwise consistent with or contrary to law.**<sup>34</sup>

The Court held that the highlighted portion of the Rule conflicts with provisions of Minn. Stat. ch. 115C and the Minnesota Administrative Procedure Act (Minn. Stat. ch. 14), by limiting the evidence that the Administrative Law Judge may consider at a contested case hearing.<sup>35</sup> As a result, the Court invalidated the Rule and returned the matter to the Office of Administrative Hearings for a contested case hearing.

On February 24, 2014, the parties, through legal counsel, appeared for a Third Prehearing Conference before the Administrative Law Judge. At the Prehearing Conference, the Board renewed its Motion for Summary Disposition. The parties agreed to a briefing schedule, which was set forth in the Third Prehearing Order dated February 27, 2014. Pursuant to that Order, Appellant was required to file a response to the Board's Motion for Summary Disposition by June 20, 2014, and oral argument on the Motion was scheduled for July 11, 2014.

On May 12, 2014, Appellant's attorney withdrew as counsel. Appellant did not file a response to the Motion for Summary Disposition and did not appear at the Motion hearing on July 11, 2014. To date, Appellant has failed to respond to the Board's Motion for Summary Disposition.

### III. Standard for Summary Disposition

Summary disposition is the administrative law equivalent to summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy.<sup>36</sup> The Office of Administrative Hearings has generally followed the summary judgment standards

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<sup>33</sup> See, *GH Holdings, LLC*, 840 N.W.2d 838.

<sup>34</sup> Emphasis added.

<sup>35</sup> *GH Holdings, LLC*, 840 N.W.2d at 843.

<sup>36</sup> See, *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); Minn. R. 1400.5500(K) (2014); Minn. R. Civ. P. 56.03.

developed in the district courts in considering motions for summary disposition of contested case matters.<sup>37</sup>

The Administrative Law Judge's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine factual issues exist.<sup>38</sup> The judge does not weigh the evidence on a motion for summary judgment.<sup>39</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.<sup>40</sup> If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case.<sup>41</sup>

To successfully defeat a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>42</sup> It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.<sup>43</sup> A genuine issue is one that is not sham or frivolous.<sup>44</sup> A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>45</sup>

While the purpose and useful function of summary judgment is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists.<sup>46</sup> Summary disposition is only proper where there is no fact issue to be decided.<sup>47</sup>

#### IV. Applicable Law

Minnesota Statutes chapter 115C provides to eligible parties who incur costs in response to the cleanup of a petroleum release, the opportunity to apply to the Petroleum Tank Release Compensation Board for reimbursement of certain reimbursable costs. The reimbursement program provided for in Minn. Stat. ch. 115C is generally referred to as the Petroleum Tank Release Cleanup Fund or "Petrofund."

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<sup>37</sup> See, Minn. R. 1400.6600 (2014)

<sup>38</sup> See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

<sup>39</sup> *Id.*

<sup>40</sup> *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

<sup>41</sup> *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), rev. denied (Minn. Feb. 6, 1985).

<sup>42</sup> *Thiele*, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>43</sup> Minn. R. Civ. P. 56.05.

<sup>44</sup> *Highland Chateau*, 356 N.W.2d at 808.

<sup>45</sup> *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976); See also, *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

<sup>46</sup> *Sauter*, 70 N.W.2d at 353.

<sup>47</sup> *Id.*

The Board administers the Petrofund program and has been authorized to adopt rules necessary to implement the program.<sup>48</sup> The administrative rules applicable to the Petrofund administration are set forth in Minn. R. ch. 2890.

Costs for “corrective action” related to a petroleum release which are incurred by an applicant and documented in a form prescribed by the Board, are reimbursable under Minn. Stat. § 115C.09, subd. 1 (2010). According to Minn. Stat. § 115C.02, subd. 4 (2010) and Minn. R. 2890.0010, subp. 29 (2010), “corrective action” means “action taken to minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.”

Minnesota Rules part 2890.0070 (2010) sets forth what specific “corrective actions” may be eligible for reimbursement from the Petrofund. Those “corrective actions” include:

- A. Emergency response and initial site hazard mitigation....
- B. Temporary site hazard control measures....
- C. Investigation and source identification including, but not limited to, collecting and analyzing soil samples, testing the groundwater, testing adjacent drinking water supplies, tank integrity testing, and engineering and geoscientific services.
- D. Development of a corrective action plan in accordance with the commissioner’s requirements.
- E. Cleanup of releases including, but not limited to, removal, treatment, or disposal of surface and subsurface contamination and provision of a permanent alternative water supply. **Cleanup must be performed in accordance with a corrective action plan approved by the commissioner.**<sup>49</sup>

The “commissioner” is defined as the commissioner of the Minnesota Pollution Control Agency (MPCA).<sup>50</sup> Thus, corrective action or cleanup that is not performed in accordance with a corrective action plan approved by the MPCA is not eligible for reimbursement from the Petrofund.

Pursuant to Minn. R. 2890.0060, subp. 2 (2010):

A reimbursement may not be made unless the Board determines that the commissioner [of the Minnesota Pollution Control Agency] has determined that the corrective action has, or when completed will have, adequately

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<sup>48</sup> Minn. Stat. §§ 115C.07 and 115C.09 (2010).

<sup>49</sup> Minn. R. 2890.0070, subp. 1 (2010) (emphasis added).

<sup>50</sup> The “commissioner” is the commissioner of the Minnesota Pollution Control Agency. Minn. Stat. § 115C.02, subd. 4 (2010); Minn. R. 2890.0015, subp. 18 (2010).

addressed the release in terms of public health, welfare, and the environment.<sup>51</sup>

In addition, a reimbursement may not be made from the Petrofund until the Board determines that the costs for which reimbursement is requested were actually incurred and were reasonable.<sup>52</sup>

As stated another way in Minn. R. 2890.0200 (2010):

Costs are not eligible for reimbursement when they are:

- A. associated with actions that do not minimize, eliminate, or clean up a release to protect the public health and welfare or the environment;
- B. not incurred by the applicant; or
- C. not reasonable.

## V. Arguments of the Parties

The Board asserts that the cleanup costs incurred by Appellants were not incurred subject to a corrective action plan ordered or approved by the MPCA, and that the costs were, instead, part of a redevelopment project. As a result, the Board argues that it is entitled to judgment as a matter of law based upon the undisputed facts included in its Motion submissions.

Appellant did not respond to the Board's Motion for Summary Disposition and has not disputed any of the facts asserted by the Board. Specifically, Appellant has failed to provide any documentation that the corrective action it took and the costs it incurred were pursuant to a corrective action plan ordered or approved by the MPCA.

## VI. Analysis

The Board asserts that "The Petrofund Board statute and rules prohibit recovery of any costs which have not been incurred for MPCA-ordered petroleum clean-up, known as corrective action."<sup>53</sup> However, the Board does not provide any legal citation for that assertion. The Board then argues that "The statute further indicates that corrective action costs are costs ordered by the MPCA."<sup>54</sup> The Board cites Minn. Stat. § 115C.03, subd. 1 (2010) for that assertion.<sup>55</sup>

Minnesota Statutes section 115C.03, subdivision 1 (2010) actually provides:

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<sup>51</sup> See also, Minn. Stat. § 115C.09, subd. 2a(d) (2010) ["A reimbursement may not be made unless the Board determines that the commissioner has determined that the corrective action *was appropriate* in terms of protecting public health, welfare, and the environment." (emphasis added)].

<sup>52</sup> Minn. Stat. § 115C.09, subd. 3(b) (2010).

<sup>53</sup> See Board's Memorandum of Law at 5.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Subdivision 1. **Corrective action orders.** If there is a release, the commissioner may order a responsible person to take reasonable and necessary corrective actions. The commissioner shall notify the owner of the real property where corrective action is ordered to be taken that reasonable persons have been ordered to take corrective action and that the owner's cooperation will be required for responsible persons to take that action. When the commissioner has ordered a responsible person to take a corrective action, a political subdivision may not request or order the person to take an action that conflicts with the action ordered by the commissioner.

Nowhere in *this* subdivision does it indicate, as the Board asserts, that corrective action costs must be ordered by the MPCA to be reimbursable.

While the Board did not provide legal citation to the applicable statute, the Board is correct that the only cleanup costs that are reimbursable from the Petrofund are those that are performed "in accordance with a corrective action plan approved by the commissioner" of the MPCA.<sup>56</sup> Minnesota Rules part 2890.0070, subpart 1E is clear and unambiguous as to this requirement.<sup>57</sup>

The undisputed facts in this case are that the Board, through Ms. Schlitz, made a brief inquiry to the MPCA about whether the MPCA approved the corrective action.<sup>58</sup> Mr. Koplitz of the MPCA responded, "No soil was approved for corrective action."<sup>59</sup> Based upon this response, the Board denied Appellant's application.

It is an applicant's duty to provide the records necessary to document the costs for which an applicant is seeking reimbursement.<sup>60</sup> Appellant failed to provide any documentation to the Board that the MPCA ordered or approved a corrective action plan for the cleanup costs which Appellant is seeking reimbursement. If such documentation exists, it should have been fairly easy for Appellant to obtain from the MPCA. Because the Appellant failed to provide the documentation necessary to qualify it for reimbursement from the Petrofund, the Board was within its authority to deny the Appellant's application.

Although Appellant failed to provide the necessary documentation to the Board in 2012, Appellant was given a second chance to provide such evidence and satisfy its burden of proof when it appealed this matter to the Office of Administrative Hearings. As determined by the Minnesota Court of Appeals in this case, Appellant is not limited to the evidence presented to the Board.<sup>61</sup> In a contested case hearing under Minn.

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<sup>56</sup> Minn. R. 2890.0070, subp. 1E (2010).

<sup>57</sup> According to Minn. R. 2890.0070, subp. 1E, "Cleanup must be performed in accordance with a corrective action plan approved by the commissioner."

<sup>58</sup> Fischer Aff., Ex. 1 at 79-85.

<sup>59</sup> *Id.*

<sup>60</sup> See e.g., Minn. R. 2890.0070, subp. 3 (2010) and Minn. Stat. § 115.09, subd. 7 (2010).

<sup>61</sup> *GP Holdings, LLC*, 840 N.W.2d at 843.

Stat. ch. 14, Appellant may present new evidence to establish its right to reimbursement.<sup>62</sup>

While Appellant may present new or additional evidence at a contested case hearing, the Appellant, nonetheless, maintains the burden of proof that it is entitled to reimbursement from the Board. According to Minn. R. 1400.7300, subp. 5:

The party proposing that certain action be taking must prove the facts at issue by a preponderance of the evidence, unless substantive law provides a different burden or standard.

Thus, on an appeal from a denial of a reimbursement application, the appellant/applicant has the burden of proof to establish its right to reimbursement from the Petrofund.

Here, it is Appellant's burden to establish that the costs for which it seeks reimbursement are recoverable under the Petrofund statute and rules. To that end, it is Appellant's burden to bring forth evidence showing that the MPCA approved the corrective action for which Appellant is seeking reimbursement, as required under Minn. R. 2890.0070, subp. 1E (2010). Appellant has repeatedly failed to present any evidence to meet its burden and the Board has thus established its authority to deny Appellant's application.

Appellant was first advised that Petrofund staff was recommending denial of Appellant's application in January 2012.<sup>63</sup> In a letter to Appellant, dated January 27, 2012, Ms. Schlitz writes:

You have requested reimbursement for \$201,439.34 in costs for consultant and contractor services that are associated with the excavation and disposal of 1,872 cubic yards of soil. *Reimbursement has not been approved for those costs because according to the MPCA Project Manager for this site, this work was not necessary for corrective action (as required by Minn. Rule 2890.0200), but rather was performed as part of the cleanup work done for the Petroleum Brownsfield [sic] Program (PBP).*<sup>64</sup>

While Ms. Schlitz's letter was not entirely precise and referenced an incorrect Rule, it sufficiently advised Appellant of the basis for the staff recommendation. Ms. Schlitz's letter advised Appellant of its right to appeal and its right to provide "[a]ny additional information that clarifies or documents the specific basis for your appeal...."<sup>65</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> Fischer Aff., Ex. 1 at 31.

<sup>64</sup> *Id.* (Emphasis added.)

<sup>65</sup> *Id.*

In a separate letter to Appellant, dated February 24, 2012, Ms. Schlitz advised Appellant of its right to appear at the Board meeting on March 14, 2012, in which Appellant's application would be reviewed.<sup>66</sup> Appellant did not present any additional documentation to the Board and failed to appear at the Board meeting to contest the staff recommendation of denying Appellant's application.<sup>67</sup> As a result, the staff's recommendation was adopted and Appellant's application was denied.

After the Board meeting, the Board specifically advised Appellant of the basis for its denial. In a letter dated March 20, 2012, the Board states:

The Board determined that the costs associated with the excavation and disposal of 1,872 cubic yards of contaminated soil at the site (totaling \$201,439.34) *are ineligible for reimbursement because this work was not approved as necessary for corrective action* (pursuant to Minn. Rule 2890.0200) *by the Minnesota Pollution Control Agency (MPCA)*. Specifically, this work was performed as part of redeveloping the property, rather than as part of a corrective action required by the MPCA.<sup>68</sup>

Appellant appealed the Board's decision to the Office of Administrative Hearings where Appellant had additional opportunities to present its evidence. However, Appellant has repeatedly failed to avail itself of those opportunities by failing to respond to the Board's Motion for Summary Disposition and by failing to appear at the Motion hearing.

Appellant has been fully advised of the basis for the Board's denial and has not presented any evidence that the MPCA required or approved the corrective action. Appellant has had several opportunities, including, most recently, the right to respond to the Board's Motion for Summary Disposition, in which to present evidence that the MPCA did, in fact, approve or require the corrective action for which Appellant seeks reimbursement. Appellant has failed to present such evidence. Thus, based upon the evidence presented in the record, an application of the law to the undisputed facts mandates summary disposition in favor of the Board.

#### **A. C. O.**

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<sup>66</sup> *Id.* at 65.

<sup>67</sup> *Id.* at 47.

<sup>68</sup> *Id.* at 46 (emphasis added).