

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Minnesota Department of Labor and
Industry,

Complainant,

vs.

MGS Professional Building Services,
Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER UPON DEFAULT**

This matter is before Administrative Law Judge James E. LaFave pursuant to a Motion for Default Judgment filed by the Commissioner of the Minnesota Department of Labor and Industry on October 23, 2013.

Rory H. Foley, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance by, or on behalf of Respondent MGS Professional Building Services.

STATEMENT OF THE ISSUE

Whether the penalties assessed against Respondent for the violations set out in Occupational Health and Safety (OSHA) Citation No. 1 should be affirmed?

SUMMARY OF CONCLUSION

The Administrative Law Judge concludes that Respondent is in default and therefore deems true and proven the allegations in the Summons and Complaint, as set forth in the Notice and Order for Hearing and Pre-Hearing Conference, and affirms all penalties set forth in OSHA Citation No. 1.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Commissioner is responsible for enforcement of OSHA regulations in Minnesota. Respondent is an employer engaged in the business of window washing.

2. On April 23 – May 14, 2012, the Department conducted an OSHA inspection of the Respondent and, on June 6, 2012, issued a citation and notification of penalties for OSHA violations.¹ It included Citation 01, Item 001, violation of Minn. R. 5205.0730, subp. 3, with a penalty of \$600.00; Citation 01, Item 0021, violation of Minn. R. 5205.0730, subp. 4, with a penalty of \$600.00; Citation 01, Item 003, violation of Minn. R. 5205.0730, subp. 5, with a penalty of \$600.00; Citation 01, Item 004, violation of Minn. R. 5205.0730, subp. 6(B), with a penalty of \$600.00; Citation 01, Item 005, violation of Minn. R. 5205.0730, subp. 7(A), with a penalty of \$2,200.00; and Citation 01, Item 006, violation of Minn. R. 5205.0730, subp. 8(G), with a penalty of \$600.00.²

3. Respondent filed a Notice of Contest with the Department.³

4. On September 20, 2012, the Department served a Summons and Notice to Respondent and Complaint (Complaint) upon Respondent by mailing same to Respondent at its last known address.⁴

5. The Complaint and the cover letter sent to Respondent stated that a written Answer must be filed with the Department within 20 days following service of the Complaint. They also stated that failure to file an Answer may constitute waiver of the right to further participate in the proceedings and could result in dismissal of the Notice of Contest.⁵

6. The record contains no evidence to support a finding that Respondent ever filed an Answer.

7. On September 20, 2012, the Department mailed to Respondent at its last known address a Notice and Order for Hearing and Pre-Hearing Conference (Notice and Order for Hearing), informing Respondent that a Prehearing Conference would be held in this matter on October 21, 2013, at 1:30 p.m., by telephone conference.⁶

8. In conformity with Minn. R. 1400.5700, the Notice and Order for Hearing requires that any party intending to “appear at the hearing must file a Notice of Appearance form and return it to the Administrative Law Judge within 20 days of the date of service” of the Notice and Order for Hearing.⁷

¹ Notice and Order for Hearing and Pre-Hearing Conference, Exhibit 2 at p. 1 (September 4, 2013).

² *Id.* at p. 5-10.

³ *Id.* at Ex. 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Notice and Order for Hearing and Pre-Hearing Conference (September 4, 2013).

9. In conformity with Minn. R. 1400.6000, the Notice and Order for Hearing in this matter also includes the following statements:

Respondent's failure to appear at the hearing or prehearing may result in a finding that the Respondent is in default, that Complainant's allegations contained in this Notice and Order may be accepted as true, and that Complainant's proposed action may be upheld.⁸

10. Respondent did not file a Notice of Appearance with the undersigned.

11. No one appeared at the October 21, 2013 Prehearing Conference on behalf of Respondent. No request was made for a continuance, nor was any communication received by the undersigned from Respondent, prior to the October 21, 2013 Prehearing Conference.

12. On October 23, 2013, the Department served the Respondent, at its last known address, with a request for entry of a default judgment.⁹

13. The Respondent failed to file a response to the Department's request for entry of default judgment.

14. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Hearing, a true and correct copy of which is appended hereto as Attachment A, are taken as true, deemed proven, and incorporated by reference into these Findings of Fact.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Department of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 182.661, subd. 3.

2. The Respondent received due, timely and proper notice of the charges against it, and of its opportunity to respond to same. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Minnesota Department of Labor and Industry has complied with all relevant procedural requirements of statute and rule.

4. Minnesota Rules part 5210.0570, subpart 1, requires that the Respondent file an Answer within 20 days, and if the Respondent fails to do so, subpart 4 states that any allegation not denied is deemed admitted and any affirmative defense not asserted is deemed waived.

⁸ *Id.*

⁹ Affidavit of Rory H. Foley (October 22, 2013).

5. Under Minn. R. 1400.6000, when a party defaults by failing to appear at a prehearing conference without the prior consent of the administrative law judge, the allegations and the issues set out in the relevant pleadings may be taken as true and deemed proved.

6. The Respondent is in default as a result of its failure to file an Answer to the Complaint and its failure to appear at the scheduled Prehearing Conference.

7. Based upon the facts set forth in the Notice and Order for Hearing and the attachments thereto, Respondent has violated Minn. Stat. § 182.653.

8. The Penalties assessed by the Commissioner for OSHA Citation No. 1 were appropriately calculated under Minn. Stat. § 182.666.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the penalties imposed on Respondent for OSHA Citation No. 1 issued following an inspection on April 23 – May 14, 2012 be AFFIRMED.

Dated: February 3, 2014

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

Not reported: Default

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.