

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Phillips Construction Co.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Barbara L. Neilson on May 24, 2006, at 2:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Labor and Industry ("the Department"). There was no appearance by or on behalf of the Respondent, Phillips Construction Co., 3465 Autumn Woods Drive, Chaska, MN 55318, or its qualifying person, John Kruse, 487 Mendota Road West, West St. Paul, MN 55118. The OAH record closed at the conclusion of the prehearing conference on May 24, 2006.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Office of the Commissioner of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument. Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency 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.

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. 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 the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

The issues presented in this case are whether the Respondent, Phillips Construction Co., installed the incorrect brand of windows, failed to complete the work items required by a binding mediation settlement, and failed to provide a satisfaction of mechanic's lien, and has thereby performed in breach of contract and acted in an incompetent, untrustworthy, and financially irresponsible manner in violation of Minn. Stat. § 326.91, subd. 1(4) and (6). If so, the further issue is whether the Respondent should be subject to discipline of its residential building contractor's license and/or a civil penalty pursuant to Minn. Stat. §§ 45.027, subd. 7, and 326.91, subd. 1.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges ("Notice of Hearing") initiating this contested case proceeding was served on the Respondent Phillips Construction Co. via first class mail on December 2, 2005, at the following addresses: Phillips Construction Co., 465 Autumn Wood Drive, Chaska, MN 55318, and John Kruse, 487 Mendota Road West, West St. Paul, MN 55118.¹

The Notice of Hearing contained the following language:

Respondent's failure to appear at the prehearing conference may result in a finding that the Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that its proposed disciplinary action may be upheld.²

The Notice of Hearing set a prehearing conference for January 5, 2005 [sic], at 2:30 p.m.³ John Kruse and counsel for the Department both appeared at the Office of Administrative Hearings on January 5, 2006, for the prehearing conference. Mr. Kruse indicated that the correct address for his business is 3465 Autumn Woods Drive, Chaska, MN 55318. After some discussion, the parties decided to confer further to see if the matter could be resolved.

By letter dated March 30, 2006, counsel for the Department informed the Administrative Law Judge that the Respondent had not returned a signed consent order that had been proposed by the Department, and requested that the matter be set back on for hearing.

By letter dated May 2, 2006, the Administrative Law Judge informed the Respondent and counsel for the Department that a prehearing conference would be held on May 24, 2006, at 2:30 p.m., at the Office of Administrative Hearings. The letter was sent to John I. Kruse, Kruse Construction Company, 3465 Autumn Woods Drive, Chaska, MN 55318.

No one appeared at the prehearing conference on May 24, 2006, on behalf of the Respondent. The Respondent did not make any request prior to the May 24, 2006, prehearing conference for a continuance or any other relief.

¹ Affidavit of Service by First Class Mail of Jean-Anne Gates attached to Notice of Hearing.

² *Id.*, p. 4.

³ Notice of Hearing, p. 1.

Because the Respondent failed to appear at the prehearing conference in this matter, it is in default.

Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of Hearing are hereby taken as true and incorporated into these Findings of Fact.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Department of Labor and Industry have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice of Hearing issued by the Department was proper and the Department has fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Respondent, having made no appearance at the prehearing conference, and not requesting any continuance or relief, is in default. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Notice of Hearing are hereby taken as true.

4. By installing the incorrect brand of windows, failing to complete the work items required by a binding mediation settlement, and failing to provide a satisfaction of mechanic's lien, the Respondent has performed in breach of contract and acted in an incompetent, untrustworthy, and financially irresponsible manner in violation of Minn. Stat. § 326.91, subd. 1(4) and (6). The Respondent is subject to discipline of its residential building contractor's license and/or a civil penalty pursuant to Minn. Stat. §§ 45.027, subd. 7, and 326.91, subd. 1. The imposition of sanctions is in the public interest.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Labor and Industry impose discipline against the residential building contractor's license and/or impose an appropriate civil penalty against the Respondent, Phillips Construction Co.

Dated: June 23, 2006

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Default.