

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

<p>In the Matter of the Residential Building Contractor's License of KJH Construction</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b></p>
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This matter came on before Administrative Law Judge (ALJ) Richard C. Luis for a Prehearing Conference on March 21, 2007 at the Office of Administrative Hearings in Minneapolis. Michael J. Tostengard, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Department of Labor and Industry (Department). There was no appearance by or on behalf of KJH Construction, Inc. (Respondent).

At the Prehearing Conference, the Administrative Law Judge agreed to continue the matter to allow the Respondent to contact either the ALJ or Assistant Attorney General Tostengard, because the Respondent had contacted the Assistant Attorney General earlier about the pending Prehearing Conference. The final contact by either was a voicemail, left by the Assistant Attorney General, asking the Respondent's qualifying person, Kelly Hartneck, to return the voicemail message and/or to contact the ALJ. The Respondent never called Mr. Tostengard again, nor has he made any other contact with Mr. Tostengard or with the Administrative Law Judge. Mr. Tostengard requested at the Prehearing Conference, and in subsequent correspondence, that a recommendation for a default order be issued by the Administrative Law Judge in the event that neither Mr. Hartneck nor anyone representing the company made subsequent contact. The record in this matter closed on September 28, 2007.

### STATEMENT OF THE ISSUE

Whether the Residential Building Contractor's License of KJH Construction should be revoked or suspended, or subjected to a civil penalty, for failure to appear at the Department as ordered, in violation of Minn. Stat. § 45.027, subd. 1a, for entering into an agreement to allow a revoked party to utilize KJH's Residential Building Contractor's license number to obtain a permit, thus committing a fraudulent, deceptive or dishonest practice in violation of Minn. Stat. § 326.91, subd. 1(2) and Minn. R. 2891.0040, subp. 1D, and for failing to satisfy a judgment against it in favor of Tonka Building Supplies, which demonstrates financial irresponsibility in violation of Minn. Stat. § 326.91, subd. 1(6)?

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

### **FINDINGS OF FACT**

1. On January 24, 2007, the Department sent a copy of the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, Statement of Charges and Notice of Appearance to the Respondent's qualifying person, Kelly James Hartneck, at the following addresses: (1) c/o KJH Construction, Inc., 11095 61st Street NE, Albertville, MN 55301, and 14916 202nd Avenue, Elk River, MN 55330. The Notice scheduled a Prehearing Conference for March 21, 2007.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges included the following paragraph, at page four:

"1. Respondent's failure to appear at the prehearing conference may result in a finding that Respondent is 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."

3. Prior to the Prehearing Conference, Mr. Hartneck contacted Assistant Attorney General Tostengard by telephone. He left a voicemail indicating that he would be unable to attend, and requesting a continuance of the Prehearing Conference. Mr. Tostengard returned Mr. Hartneck's call, and left a voicemail indicating to the Respondent's qualifying person that he was obligated to attend the Prehearing Conference unless the Administrative Law Judge granted a continuance, and that Mr. Hartneck had to contact the Judge to make that request. Mr. Hartneck did not contact the ALJ prior to the Prehearing Conference.

4. At the Prehearing Conference, after neither Mr. Hartneck nor anyone else appeared on behalf of the Respondent, Assistant Attorney General Tostengard moved for the entry of a report recommending the issuance of a default order, but requested that the matter be stayed to allow Mr. Hartneck a reasonable time to make contact again with himself or with the Administrative Law Judge. The Administrative Law Judge granted Mr. Tostengard's request.

5. Neither the Respondent's qualifying person nor anyone else on behalf of the Respondent has contacted Assistant Attorney General Tostengard or the Administrative Law Judge during the interim period since the convening of the Prehearing Conference. As a result, counsel for the Department has now moved for a default.

6. The Respondent is in default in this matter.

7. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges are taken as true and deemed proven. They are incorporated by reference into these Findings of Fact.

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

### **CONCLUSIONS**

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

2. The Respondent received proper and timely notice of the charges in this matter and of the time and place of the Prehearing Conference. This matter is properly before the Administrative Law Judge and the Commissioner of Labor and Industry. The Department has complied with all procedural requirements.

3. Under Minn. R. 1400.6000, a contested case may be decided against a party who defaults. Upon default, the allegations set out in the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause and Statement of Charges may be taken as true or deemed proved without further evidence.

4. The Respondent is in default as a result of his failure to appear at the Prehearing Conference and his failure to contact subsequently either the Assistant Attorney General representing the Department or the Administrative Law Judge.

5. The Respondent has violated Minn. Stat. §§ 14.027, subd. 1a, 326.91, subd. 1(2), 326.91, subd. 1(6) and Minn. R. 2891.0040, subp. 1D by failing to appear at the Department as ordered, by entering into an agreement to allow a revoked party to utilize its Residential Building Contractor's License for obtaining a permit, which constitutes the commission of a fraudulent, deceptive or dishonest practice, and by failing to satisfy a judgment, which demonstrates financial irresponsibility.

6. The taking of appropriate disciplinary action against the Respondent is in the public interest within the meaning of Minn. Stat. § 45.027, subd. 7(a)(1).

Based on the Conclusions, the Administrative Law Judge makes the following:

## RECOMMENDATION

IT IS RECOMMENDED that appropriate disciplinary action be taken against the license of KJH Construction, Inc.

Dated: October 4, 2007

/s/ Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge

Reported: Default

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department 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 Steve Sviggum, Commissioner, Attn: Nancy Leppink, Director of Legal Services, Minnesota Department of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

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 10 working days to allow the Judge to determine the discipline to be imposed. 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.

Under 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.