

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS

DEPARTMENT OF LABOR &
ECONOMIC GROWTH,
BUREAU OF COMMERCIAL SERVICES *ex rel*
THOMAS AND SANDRA BOAKS

Docket No. 2008-880
Complaint No. 308135

Complainant,

v

JOSEPH MICHAEL BAUMGARTEN
License No. 21-01-169004

Respondent.

FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on November 18, 2008;

WHEREAS, the Board having received a Hearing Report under MCL 339.514 for this case and the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of James Sisk, Administrative Law Judge, dated August 25, 2008;

WHEREAS, the hearing report is hereby incorporated by reference;

WHEREAS, the Respondent having been found in violation of the Michigan Occupational Code, PA 299 of 1980, hereafter the "Code," or rules promulgated there under, now, therefore,

IT IS ORDERED, that the following penalties authorized by Section 602 of the Code are imposed:

- 1. Respondent shall pay a FINE in the amount of \$2,500.00. The fine is payable to the State of Michigan within 60 days from the mailing of this Final Order. Complaint No. 308135 must be clearly indicated on the check or money order, and the payment sent to the Department of Labor & Economic Growth, Administrative Services Division, P.O. Box 30018, Lansing, MI 48909.**

- 2. Respondent shall pay RESTITUTION in the amount of \$60,000.00, to Thomas and Sandra Boaks by certified check made payable to Thomas and Sandra Boaks and mailed to 47773 Ben Franklin, Shelby Township, MI 48315, within 60 days from the mailing date of this Final Order.**

3. Respondent's failure to comply with each and every condition of this Final Order shall result in SUSPENSION of any and all Article 24 licenses held by Respondent. No application for licensure, relicensure, reinstatement or renewal shall be considered or granted by the Department until all Final Orders of the Board have been fully complied with. Respondent may not serve as the Qualifying Officer of any licensed corporate entity while any other Article 24 license held by Respondent is in suspended or revoked status.

4. Respondent shall submit in writing to the Michigan Department of Department of Labor & Economic Growth, Bureau of Commercial Services, Administrative Services Division, P.O. Box 30018, Lansing, Michigan 48909, proof of compliance with each and every requirement of this Final Order, in a form acceptable to the Department.

This Final Order shall not be construed as limiting the Department of Labor & Economic Growth, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the payment imposed by this Final Order.

Failure to comply with the provisions of this Final Order is considered a violation of the Code pursuant to Section 604(k) and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this 15th day of January, 2009.

BY: Mark T. Glynn
Mark T. Glynn, Chairperson

Date mailed: 1-15-09

Proof of Compliance should be filed with:

Department of Labor & Economic Growth, Bureau of Commercial Services
Administrative Services Division
P.O. Box 30018
Lansing, MI 48909

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of	Docket No.	2008-880
Bureau of Commercial Services, Petitioner	Agency No.	308135
V	Agency:	Bureau of Commercial Services
Joseph Michael Baumgarten, Respondent	Case Type:	Sanction

Issued and entered
this 25th day of August, 2008
by James Sisk
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with the filing of a Request for Hearing on July 3, 2008. Pursuant to the Request, the State Office of Administrative Hearings and Rules (SOAHR) issued a Notice of Hearing dated July 7, 2008. The Notice of Hearing scheduled a contested case hearing for August 19, 2008.

The hearing commenced as scheduled. John P. Mack, Assistant Attorney General, appeared on behalf of the Bureau of Commercial Services (BCS), Petitioner. Neither Respondent, nor an attorney on behalf of Respondent, appeared and participated in the hearing. Thomas Boaks, Complainant, and James Zakshesky, Building Inspector, also appeared and testified as witnesses.

The Notice was issued pursuant to allegations set forth in a Formal Complaint issued March 20, 2008. The Complaint alleged that Respondent violated the Occupational

Code of 1980 (Code), 1980 PA 299, as amended, being MCL339.101, *et seq.*, and the Administrative Rules promulgated pursuant thereto.

At the hearing, Petitioner moved to be allowed to proceed in the absence of Respondent pursuant to §72 of the Administrative Procedure Act of 1969 (APA), 1969 PA 306, as amended, being MCL24.272 (1) and, also, moved that a default be granted pursuant to §78 of the APA, being MCL24.278.

§72 (1) of the APA provides in pertinent part:

- (1) if a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party [MCL 24.272(1)].

§78 (2) of the APA provides in pertinent part:

- (2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties [MCL 24.278(2)].

The Administrative Law Judge (ALJ) granted Petitioner's Motion for Default. Because of that, the ALJ deemed proven the allegations set forth in the Formal Complaint.

At the hearing, Petitioner admitted the following documents into evidence as

Exhibits:

Petitioner's Exhibit #1	Series of Photographs of residence
Petitioner's Exhibit #2	Building Inspection Report dated May 19, 2004

ISSUES AND APPLICABLE LAW

The Formal Complaint raises the issue of whether Respondent violated the Code or the Rules; specifically, whether Respondent violated §604 (c) and 2411 (2) (m) of

the Code, being MCL 339.604 (c) and 339.2411 (2) (m), and/or Rules 51 (2), (4), and (5) of the Residential Building Code (RBC), being 2006 AACCS, R338.1551 (2), (4), and (5).

§604 (c) provides:

A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 604:

(c) violates a rule of conduct of an occupation

§2411 (2) (m) provides:

A licensee or applicant who commits 1 of the following shall be subject to the penalties set forth in article 6:

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Rules 51 (2), (4), and (5) provide:

(2) Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. The licensee shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or a portion of the complaint is not acknowledged by the licensee as being justified, then the department shall notify the complainant of the area of disagreement.

(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous, or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

(5) Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance

with the building code of the nearest political subdivision having a building code.

FINDINGS OF FACT

Based upon the record of this matter, the pleadings, exhibits accepted into the record, and the default, the ALJ finds that the following facts have been established:

1. Respondent has, at all times relevant to this Complaint, possessed and maintained a valid residential builder's license pursuant to the Code.
2. On June 29, 2005, Complainants, Thomas and Sandra Boaks, entered into a contract with Respondent pursuant to which Respondent agreed to remodel and repair a property and residence owned by Complainants located at 1739 Grand Lake Blvd., Presque Isle, Michigan 49777 in return for which Complainants would pay Respondent the total sum of \$71,380.00.
3. Pursuant to the contract, Respondent agreed to perform stone work and install a second floor on the residence, remodel the kitchen and first floor bedroom, put in insulation, as well as install a tongue and groove ceiling in the great room.
4. The parties anticipated that Respondent would complete the work by December 2006.
5. Problems developed with the workmanship and the work performed by Respondent.
6. On August 20, 2007, Complainants filed a complaint with BCS, which alleged that Respondent: (1) did not ventilate either the first or second floor roofs properly; (2) installed roof shingle incorrectly; (3) did not install flashing around the chimney; (4) the roof cricket was tilted incorrectly, causing water to be shed in the wrong direction; (5) did not insulate the rim joist and certain other areas; (6) did not plumb interior walls and doors; (7) installed windows incorrectly and did not plumb them; (8) the materials used to construct the staircase are falling apart; (9) demonstrated poor workmanship in the installation of interior trim; (10) did not install porch footing below the frost line, and (11) did not insulate the back exterior porch ceiling.
7. Complainants paid another contractor approximately \$40,000.00 to (1) reinstall the windows, (2) replace a wall, (3) put new trim on the residence, and (4) insulate the residence.
8. Complainants obtained estimates to repair the roof of approximately \$20,000.00, but they have not yet made the repairs.
9. Zakshesky, a building inspector, inspected the premises on September 27, 2007.

10. Zakshesky's inspection revealed the following code violations: (1) improper venting of first and second floor roof assemblies in violation of RBC Rule 806; (2) shingles installed improperly in violation of RBC Rules 902.2.5 and 902.2.6; (3) chimney not flashed and cricket leaning in the wrong direction in violation of RBC Rules 905.2.8.3 and 905.2.8.5; (4) no flashing on the short eave of the roof in violation of RBC Rule 905.2.8.5; (5) rim joist and certain other areas devoid of insulation in violation of Michigan Energy Code Rule 1074; (6) interior walls and doors not plumb; (7) windows not plumb; (8) staircase materials falling apart; (9) interior trim reveals poor workmanship; (10) porch footing not poured below the frost line; (11) back porch ceiling not insulated in violation of Michigan Energy Code Rule 1074, and (12) original porch floor not supported correctly (Petitioner's Exhibit #2).
11. Respondent failed to correct the code violations and workmanship problems uncovered by Zakshesky's inspection within a reasonable time.
12. Respondent failed to respond to the Complaint in a timely manner as required by RBC Rule 51 (2), being R338.1551 (2).

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 *Callaghan's Michigan Pleading and Practice* (2nd Ed.) §60.48, page 230.

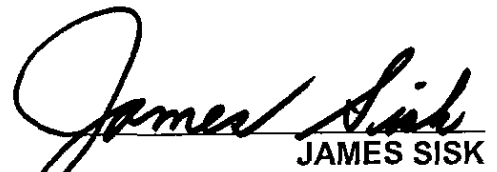
Petitioner has the burden of proof to establish by a preponderance of the evidence that grounds exist for the imposition of sanctions pursuant to MCL 339.602 of the Code.

Pursuant to §72 of the APA, a full evidentiary hearing need not be held when the alleged facts are accepted as true. *Smith v Lansing School District*, 428 Mich 248 (1987). Based upon the record in this matter, including the exhibits, as well as the fact that the ALJ granted a default, the ALJ finds that Petitioner has established by a preponderance of the evidence that Respondent violated MCL 339.604 (c) and MCL339.2411 (2) (m) of the Code and Rules 51 (2), (4), and (5), being R338.1551 (2), (4), and (5).

RECOMMENDATIONS

Based upon the Findings of Fact and Conclusions of Law, the ALJ makes the following recommendations to the Board:

1. Require Respondent to make restitution to Complainants in the amount of \$60,000.00 within 60 days of the Board's final order.
2. Require Respondent to pay a civil fine of \$2,500.00 within 60 days of the Board's final order.
3. Suspend all licenses or registrations under the jurisdiction of the code and bar the issuance of any new licenses or the granting any applications for renewal of such licenses or registrations until Respondent has paid the restitution and civil fine.


JAMES SISK
ADMINISTRATIVE LAW JUDGE

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 25th day of August, 2008.



J. Barbee

State Office of Administrative Hearings and Rules

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