

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*
DAVE AND VALERIE FENWICK

Docket No. 2008-974
Complaint No. 308218

Complainant,

v

KBC CONSTRUCTION, LLC
KENNETH D. HARBER, QUALIFYING OFFICER
License No. 21-02-177867

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 Roger E. Winkelman, Administrative Law Judge, dated September 24, 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, and the Board having elected to exercise its authority pursuant to MCL 339.514 to impose penalties different from those recommended by the Administrative Law Judge; 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 \$20,000.00. The fine is payable to the State of Michigan within 60 days from the mailing date of this Final Order. Complaint No. 308218 must be clearly indicated on the check or money order, and the payment sent to the Department of Labor & Economic Growth, Bureau of Commercial Services, Administrative Services Division, P.O. Box 30018, Lansing, Michigan 48909.
2. Respondent shall make RESTITUTION to Dave and Valerie Fenwick by satisfying the lien filed by Hartwick Electric, Inc by mailing a certified check in the amount of \$10,750.00 made

KBC Construction LLC
Kenneth Harber, Qualifying Officer
Final Order in Complaint No. 308218
Page 1 of 2

payable to Hartwick Electric, Inc., whose address is PO Box 632, Oxford, MI 48371 and satisfying the lien filed by Dillman and Upton, Inc. mailing a certified check in the amount of \$13,098.12 made payable to Dillman and Upton, Inc., whose address is 607 Woodward, Rochester, MI 48307. If Dave and Valerie have paid the lien holders, then Respondent shall reimburse them by remitting a certified check in the amount of \$23,839.12 made payable Dave and Valerie Fenwick and mailed to 1835 Holland, Birmingham, MI 48009. The restitution shall be paid within 60 days from the mailing date of the Final Order.

3. The license of Respondent, and any and all Article 24 licenses held by Respondent or Respondent's Qualifying Officer shall be and hereby are IMMEDIATELY REVOKED. Respondent's Qualifying Officer may not serve as the Qualifying Officer of any licensed corporate entity while any other Article 24 licenses held by Respondent or Respondent's Qualifying Officer are in suspended or revoked status. 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.

4. Respondent's failure to comply with each and every condition of this Final Order within 60 days shall result in CONTINUED REVOCATION of any and all Article 24 licenses held by Respondent or Respondent's Qualifying Officer.

5. 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.	2008-974
Bureau of Commercial Services, Petitioner	Agency No.	308218
v	Agency:	Bureau of Commercial Services
KBC Construction LLC Kenneth Harber, Q.O., Respondent	Case Type:	Sanction

Issued and entered
this 24th day of September, 2008
by Roger E. Winkelman
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the issuance of a Notice of Hearing upon a Formal Complaint issued by the Enforcement Division of the Department of Labor & Economic Growth's Bureau of Commercial Services (Petitioner) dated July 17, 2008. Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.* (APA), Respondent was afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondent failed to satisfactorily demonstrate compliance and, as a result, the matter was set and noticed for a formal hearing. The Notice of Hearing scheduled the contested case to commence on Wednesday September 10, 2008 at 9:00 a.m. at the State Office of Administrative Hearings & Rules of the Department of Labor & Economic Growth, Cadillac Place, 2nd Floor Annex, Room 2-700, 3026 West Grand Boulevard, Detroit, Michigan. Further, the

notice informed Respondent that if Respondent failed to appear at the hearing as scheduled, a default may be entered pursuant to Section 78 of the APA. The hearing commenced at about 10:07 a.m. Roger E. Winkelman presided as Administrative Law Judge. Tiffany Daugherty, Esquire, appeared on behalf of Department of Labor & Economic Growth, Bureau of Commercial Services (Petitioner). Dave and Valerie Fenwick (Homeowners) and Lawrence Rospierski (Building Inspector) appeared at the hearing. Neither KBC Construction LLC, Kenneth D. Harber, Qualifying Officer (Respondent), nor anyone on Respondent's behalf appeared for the hearing.

At the outset of the contested case hearing, it was requested that a default be entered on behalf of Petitioner pursuant to Section 78 of the APA. Section 78 of the APA provides, in pertinent part:

“(2) Except as otherwise provided by law, disposition may be made of a contested case by...default...”

The judge granted Petitioner's motion for a default. As a result of the default, the factual allegations contained in Petitioner's Formal Complaint were deemed true.

ISSUES AND APPLICABLE LAW

The general issue presented is whether or not Respondent violated the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.*, with respect to the practice as a residential builder. The specific issues are whether or not Respondent violated MCL 339.604(c), MCL 339.2411(2)(a), (c), (l) and (m), and 1979 AC, R 338.1551(5), which provide in pertinent part:

Sec. 604. 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 602:

(c) Violates a rule of conduct of an occupation

Sec. 2411. (2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.

(c) Failure to account for or remit money coming into the person's possession which belongs to others.

(l) Becoming insolvent, filing a bankruptcy action, becoming subject to a receivership, assigning for the benefit of creditors, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business.

(m) Workmanship not meeting the standards of the Michigan residential code as promulgated under the Stille-DeRossett-Hale single state construction code act, 1972 PA 230, MCL 125.1501 to 125.1531.

Rule 51. (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.

EXHIBITS

Petitioner offered the following three exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Building Inspection Report
2	Claim of Lien for \$13,089.12
3	Claim of Lien for \$10,750.00

FINDINGS OF FACT

Respondent has at all times relevant to this Complaint, been licensed as a residential builder under the Occupational Code.

A Complaint against Respondent conforming to the requirements of Section 2411 of 1980 PA 299, as amended, MCL 339.2411 has been filed with the Department of Labor & Economic Growth.

An authority charged with the enforcement of the laws governing construction of residential or residential and commercial buildings in the political subdivision in which the building is located, has submitted an evaluation of the Complaint submitted.

Respondent entered into a contract to perform services regulated by the Code, with David Fenwick on or about September 8, 2006.

Respondent has failed to perform the requirements of the contract in a workmanlike manner.

Respondent, in performance of the contract, failed to comply with Sections R310.2.1, R310.4, R109.4, R312.2, R311.5.3.1 and R319.3 of the 2003 Michigan Residential Code, which was adopted pursuant to the Stille-Derossett-Hale single state construction code act, effective February 24, 2004.

Respondent has, without legal excuse, failed to perform the terms of the contract.

Respondent failed to satisfy a lien, Exhibit 2, filed on June 22, 2007, by Dillon and Upton, Inc., in the County of Oakland, Michigan.

Respondent failed to satisfy a lien, Exhibit 3, filed on July 25, 2007, by Hartwick Electric, Inc. in the County of Oakland, Michigan.

Respondent has failed to pay money to subcontractors and/or suppliers with whom Respondent has contracted to perform the services required by the contract.

Respondent has violated a rule of conduct in practicing an occupation.

Respondent was properly served with notice of this proceeding but did not appear for the hearing.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading & Practice (2d ed) § 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. 1990 AACS, R 339.1763.

Under Section 72 of the APA, there is no need to provide a full evidentiary hearing when all alleged facts are taken as true. *Smith v Lansing School District*, 428 Mich 248; 406 NW2d 825 (1987).

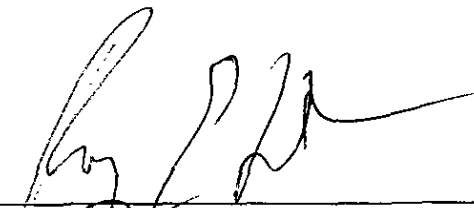
Based upon the facts described herein, Petitioner has established that Respondent violated MCL 339.604(c), MCL 339.2411(2)(a), (c), (l) and (m), and 1979 AC, R 338.1551(5), as described in the Formal Complaint.

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent has violated MCL 339.604(c), MCL 339.2411(2)(a), (c), (l) and (m), and 1979 AC, R 338.1551(5) subjecting Respondent to disciplinary sanctions under Section 602 of the Code. Petitioner recommended that sanctions include restitution of \$23,839.12 payable to Dave Fenwick.

It is recommended that the Board include the following as sanctions in this matter:

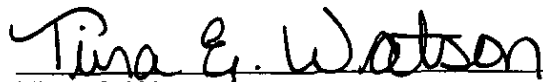
1. Payment of a civil fine in the amount that the Board deems fair and reasonable.
2. Payment of restitution of \$23,839.12 to pay off the lien to the lien holders unless Dave Fenwick has previously paid the liens then restitution to him.
3. In the event the civil fine and restitution have not been paid within 60 days following the issuance of a final order, then all Article 24 licenses should be suspended and no new or renewal licenses should be issued until the civil fine and restitution have been paid.



Roger E. Winkelman
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 24th day of September, 2008.



Tina E. Watson
State Office of Administrative Hearings and Rules

Kenneth D. Harber
KBC Construction, LLC
604 Oxford Oaks Court
Oxford, MI 48371

Kenneth D. Harber
KBC Construction, LLC
811 Doral Drive
Oxford, MI 48371

Stephen J. Gobbo
Bureau of Commercial Services
2501 Woodlake Circle
Okemos, MI 48864

Tiffany N Daugherty
Bureau of Commercial Services
3026 W. Grand Blvd.
Suite 11-300
Detroit, MI 48202