

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH¹
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS

DEPARTMENT OF ENERGY, LABOR &
ECONOMIC GROWTH,
BUREAU OF COMMERCIAL SERVICES *ex rel*
ARTHUR AND DIANE MUCCIANTE

Docket No. 2008-816
Complaint No. 306477

Complainant,

v

DAVID R. FISHER
License No. 21-01-163237

Respondent.

FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on May 5, 2009;

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 January 2, 2009;

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 \$1,000.00. The fine is payable to the State of Michigan within 60 days from the mailing date of this Final Order. Complaint No. 306477 must be clearly indicated on the check or money order, and the payment sent to the Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, P.O. Box 30018, Lansing, Michigan 48909.

¹ Effective December 28, 2008, by Executive Order 2008-20, the Department of Labor & Economic Growth (DLEG) was reorganized and renamed as the Department of Energy, Labor & Economic Growth (DELEG).

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. 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. 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 shall submit in writing to the Michigan Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, 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 Energy, 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 22 day of July, 2009.

BY: 
Mark T. Glynn, Chairperson

Date mailed: July 22, 2009

Proof of Compliance should be filed with:

Department of Energy, Labor & Economic Growth, Bureau of Commercial Services
Final Order Monitoring
P.O. Box 30018
Lansing, MI 48909

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

In the matter of	Docket No.	2008-816
Bureau of Commercial Services, Petitioner	Agency No.	306477
V	Agency:	Bureau of Commercial Services
David R. Fisher, Respondent	Case Type:	Sanction

Issued and entered
this 2nd day of January, 2009
by James Sisk
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with the filing of a Request for Hearing on June 19, 2008. Pursuant to receipt of the Request for Hearing, the State Office of Administrative Hearings and Rules (SOAHR) issued a Notice of Hearing (Notice) on June 27, 2008. Pursuant to the Notice, SOAHR scheduled a contested case hearing for August 19, 2008.

On August 12, 2008, Respondent requested an adjournment of the hearing.

The Administrative Law judge (ALJ) granted the request and issued an Order Granting Adjournment on August 19, 2008. SOAHR rescheduled the contested hearing for October 13, 2008.

The rescheduled hearing commenced as scheduled. John P. Mack, Assistant Attorney General, represented petitioner, Bureau of Commercial Services (BCS).

Aaron J. Gauthier, Attorney at Law, represented Respondent. David Fisher, Respondent, also appeared. In attendance at the hearing, as well, were Juanita Fisher, wife of

Respondent, Art and Diane Mucciante, Complainants, and James Zakshesky, Building Inspector.

During the hearing, Petitioner introduced the following exhibits:

Petitioner's Exhibit #1	Building Contract dated April 24, 2006
Petitioner's Exhibit #2	Building Cost Estimate
Petitioner's Exhibit #3	Photographs of Exterior of House
Petitioner's Exhibit #4	Photographs of Kitchen Counter Top
Petitioner's Exhibit #5	Photographs of Upstairs Bedroom Floor
Petitioner's Exhibit #6	Video Still Pictures of Roof
Petitioner's Exhibit #7	Additional Photographs of Roof
Petitioner's Exhibit #8	Building Permit
Petitioner's Exhibit #9	Temporary Occupancy Permit dated January 12, 2007
Petitioner's Exhibit #10	Certificate of Occupancy
Petitioner's Exhibit #11	Temporary Occupancy Permit dated March 26, 2007
Petitioner's Exhibit #12	March 23, 2007 Building Inspection Report
Petitioner's Exhibit #13	August 15, 2007 Amendment to Building Inspection Report
Petitioner's Exhibit #14	Affidavit of Clewley
Petitioner's Exhibit #15	Business Registration Certificate

Respondent introduced the following exhibits:

Respondent's Exhibit #1	May 21, 2007 Letter from Respondent to Complainant
Respondent's Exhibit #2	Notice to Respondent of Receipt of Complaint

Respondent's Exhibit #3	May 25, 2007 Letter from Complainant to Respondent
Respondent's Exhibit #4	Photographs of Truss Spans
Respondent's Exhibit #5	Respondent's Builder's License
Respondent's Exhibit #6	April 23, 2007 Letter from Respondent to Building Inspector
Respondent's Exhibit #7	June 5, 2007 Letter from Respondent to BCS
Respondent's Exhibit #8	June 12, 2007 Letter from Respondent to BCS

In a closing statement, Respondent argued that no sanction should be taken against his builder's license because Complainants did not provide him with notice and an opportunity to correct the defects in workmanship and code violations in violation of Section 2411(5)(f) of the Code, being MCL 339.2411(5)(f). The parties requested the opportunity to brief the issue, and the ALJ granted the request. The ALJ held the record open until December 12, 2008 to allow the parties to submit their respective briefs.

The ALJ received the briefs in a timely fashion and closed the record on December 12, 2008.

ISSUES AND APPLICABLE LAW

This matter raises the issue of whether Respondent violated the Occupational Code (Code), 1980 PA 299, as amended, being MCL 339.101, *et seq.*, and the Administrative Rules (Rules) promulgated pursuant thereto. Specifically, this matter raises the issue of whether Respondent violated Section 604(c) and Section 2411(2)(m) of the Code, being MCL 339.604(c) and MCL 339.2411(2)(m), as well as Rules 21(3) and 51(5)

of the Residential Builders and Maintenance and Alteration Contractors Board, being R338.1521(3) and R338.1551(5). The Sections of the Code and Rules, in pertinent part, state:

Section 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 or conduct of an occupation

Section 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:

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

Section 2411(5). Notwithstanding article 5, the following apply to administrative Proceedings regarding workmanship under subsection (2)(m):

(d) A licensee may contractually provide for an alternative dispute resolution procedure to resolve complaints filed with the department. The procedure shall be conducted by a neutral third party for determining the rights and responsibilities of the parties and shall be initiated by the licensee, who shall provide notice of the initiation of the procedure to the complainant by certified mail not less than 30 days before the commencement of that procedure. The procedure shall be conducted at a location mutually agreed to by the parties.

(e) The department shall not initiate a proceeding against a licensee under this subsection in the case of a licensee who contractually provides for an alternative dispute resolution procedure that has not been utilized and completed unless it is determined that the licensee has not complied with a decision or order issued as a result of that alternative dispute resolution procedure, that alternative dispute resolution procedure was not fully completed within 90 days after the filing of the complaint with the department, or an alternative dispute resolution procedure meeting the requirements of subdivision (D) is not available to the complainant.

(f) The complainant shall demonstrate that notice has been provided to the licensee describing reasonable times and

dates that the residential structure was accessible for any needed repairs and proof acceptable to the department that the repairs were not made within 60 days after the sending of the notice. This subdivision does not apply where the department determines a necessity to safeguard the structure or to protect the occupant's health and safety and, in such case, the department may utilize any remedy available under section 504(3)(a) through (d).

Rule 21(3), R338.1521(3). A foreign company shall submit evidence of current authority to do business in Michigan.

Rule 51(5), R338.1551(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.

R106.4 of 2003MRC. Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents.

R311.5.3.1 of 2003 MRC. The maximum tread depth shall be 9 inches (229mm). The riser shall be measured vertically between leading edges of the adjacent treads. The greatest riser height within any flight of stairs shall not exceed the smallest by more than 3/8 inch (9.5 mm).

R903.1 of 2003 MRC. Roof decks shall be covered with approved roof coverings secured to the building or structure in accordance with the provisions of this chapter. Roof assemblies shall be designed and installed in accordance with this code and the approved manufacturer's installation instructions such that the roof assembly shall serve to protect the building or structure.

R905.1 of 2003 MRC. Roof coverings shall be applied in accordance with the applicable provisions of this section and the manufacturer's installation instructions.

FINDINGS OF FACT

1. At all times relevant to this matter, Respondent maintained a valid residential builder's license.
2. On April 24, 2006, Complainants entered into a contract with Respondent for Respondent to demolish the remains of an existing residence and

construct a new, two-story residence on property located at 762 Grand Point Road, Presque Isle, Michigan at a total price of \$326, 483.00.

3. Respondent commenced work on the contract, promising Complainants that the work would be complete two weeks prior to Thanksgiving 2006.

4. Complainants obtained a certificate of occupancy for the residence on January 18, 2007.

5. Problems occurred in the construction of the residence, and the local building enforcement authority withdrew the certificate of occupancy after a subsequent inspection by the local building inspector discovered violations of some 2003 Michigan Residential Code (MCR) Rules and, also, some workmanship provisions of the Code.

6. The local building authority issued a temporary occupancy permit to Complainants on March 26, 2007 so that they could continue to occupy the property, which they used as their family residence.

7. Complainant, Arthur Mucciante, testified to the following problems that arose with the construction of the residence:

A.) Exterior soffit and fascia not of the type of material agreed upon, dented in places, did not meet residence walls at a 45° angle, and part of the soffit and fascia not attached to the residence correctly;

B.) 3/8" to 5/8" gaps in the flooring of the room above the garage;

C.) A hump or crown in the second floor hallway;

D.) Defective seams, incorrect angles, and cracks in the drywall;

E.) Stairway and banister to second floor constituted a substitute for the one the contract required to be installed;

F.) Front entrance posts not set correctly, the left column overhangs concrete by 1 ½ inches, and both columns out of level by 1 inch at top and bottom;

G.) Kitchen countertop out of square and pulling away from supporting cabinets;

H.) Exterior French door in master bedroom will not open and close without the use of excessive force, and it is not properly insulated;

I.) Interior door to master bedroom not hung correctly, and a gap of $\frac{1}{2}$ to $\frac{3}{4}$ inch exists at bottom of door, and

J.) Asphalt roof shingles bubbled up, pulled loose, and separated from the roof.

8. Zakshesky, the local building inspector, inspected the property on March 15, 2007 and found the following code violations (Petitioner's Exhibit #12) :

A.) Stairway to second floor 2 inches narrower than blueprint specifications in violation of the 2003 MRC R106.4;

B.) 1st. and 3rd. steps of stairway not in compliance with the requirements of MRC R 311.5..3.1;

C.) Roof truss spacing not 24 inches as required by MRC R106.4, and

D.) Shingles not properly fastened to roof in violation of MRC R903.1.

9. Additionally, Zakshesky found the following workmanship violations (Petitioner's Exhibit #12):

A.) Drywall not completed and poorly finished;

B.) Fascia and soffit material pulling away and not properly fastened;

C.) Front door casing loose and not properly fastened, and

D.) Kitchen countertop and backsplash poorly installed and separating from cabinets.

10. Zakshesky conducted follow-up inspections in July 2007 and on August 7, 2007.

11. He issued an inspection report on August 15, 2007 (Petitioner's Exhibit #13) that found the following code and workmanship violations:

A.) Roof shingles not properly installed in violation of MRC R903.1 and R905.1, and

B.) Bedroom door to outside does not open properly.

12. Zakshesky testified that he measured the distances between the roof trusses and found the spacing to be 26 inches, not 24 inches as required by 2003 MRC 903.1.

13. Respondent testified that he used a metal spacing brace designed to separate the trusses by 24 inches, and he offered a photograph of the trusses into evidence (Respondent's Exhibit #4) to corroborate his testimony.

14. Respondent testified that he and a co-worker also measured the physical distance between the trusses, and they were properly spaced.

15. The contract between the parties (Exhibit #1) contained an alternative dispute resolution process clause for resolving disputes between Complainants and Respondent.

16. Respondent sent a letter to Complainants on May 21, 2007 (Respondent's Exhibit #1) in which he acknowledged receipt of their complaint and offered to meet with them to arrange making the necessary repairs to the property, and also reminded Complainants to engage in an alternative dispute resolution process to resolve the issues.

17. On May 25, 2007, Complainants' attorney sent a letter to Respondent (Respondent's Exhibit #3) advising that Complainants were in the process of obtaining estimates of the cost of correcting the problems at the property.

18. Complainants instituted a separate civil suit against Respondent in the local Circuit Court for violation of the contract in addition to filing a complaint with BCS and refused to submit to an alternative dispute resolution process pursuant to the provisions of the contract (Exhibit #1).

19. Respondent testified that Barden custom built the home, and it could not deliver the fascia material agreed upon in the contract.

20. Respondent testified that Complainants agreed that he could substitute other fascia material and bend it to fit the structure.

21. Respondent admitted that the front door frame had not been fastened securely, but he insisted that since it was installed during cold weather, the parties agreed that he could return in the spring and secure it properly.

22. Respondent attributed the drywall problem to electricians and plumbers punching holes in the walls to move wiring and pipes.

23. Respondent insisted that the hump in the upstairs hallway resulted from installing the floor after the walls had been set, as well as the fact that one of the walls extended 1½ inches beyond the top stair.

24. Respondent testified that the stairwell was custom made by Barden, and the width met the specifications of the blueprint, but he conceded that the 1st and 3rd steps were higher than the remaining steps.

25. Respondent testified that Barden delivered a countertop different from that ordered.

26. Respondent testified that he twice reset, sealed, and braced the countertop to the cabinets, but both times Complainants removed the bracing before the sealant had time to harden.

27. Respondent testified that he employed experienced roofers to install the roofing.

28. Respondent filed a d/b/a with Presque Isle County but admits that he failed to file it with BCS because he did not know that he had to do so.

29. Respondent took steps to file the d/b/a with BCS as soon as he learned that he needed to do so.

CONCLUSIONS OF LAW

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

Petitioner bears the burden of proof to establish by a preponderance of the evidence that grounds exist for the imposition of sanctions pursuant to 1990 AACRS, R339.1763.

Based upon the evidentiary record in this matter, including the testimony and exhibits, the ALJ finds that Petitioner has established by a preponderance of the evidence that Respondent engaged in the following violations of the Code and the Rules:

1. Respondent violated R106.4 of the 2003 MRC by constructing the stairway in a fashion that made it two inches narrower at the top than the blueprints for the work.
2. Respondent violated R106.4 of 2003 MCR by not spacing the roof trusses at 24-inch intervals.
3. Respondent violated R311.5.3.1 of 2003 MRC by constructing the steps to the second floor so that the first and third step were not 9 inches in height.

4. Respondent violated R903.1 and R905.1 of 2003 MRC by not properly securing the roof shingles to the roof.

5. Respondent's violations of R106. 4, R331.5.3.1, R903.1, and R905.1 collectively constitute violations of Rule 51(5), R338.1553(5).

6. Since Complainants did not abide by the alternative dispute resolution clause of the contract (Exhibit #1), as well as the requirements of Section 2411(5)(f) of the Code, being MCL 339.2411(5)(f), the ALJ finds that Section 2411(5)(e), MCL 339.2411(5)(e) bars BCS from bringing this complaint with respect to any workmanship violations. Respondent cannot be sanctioned for the following workmanship violations pursuant to Section 2411(2)(m) of the Code, being MCL 339.2411(2)(m):

A.) fit and finish of the soffit and fascia;

B.) drywall not completed or poorly finished;

C.) loose front door casing;

D.) poor installation of kitchen countertop and back splash, and

E.) bedroom egress door to outside does not close properly.

7. By failing to file his business documents with BCS, Respondent violated R338.1521(3).

DECISION

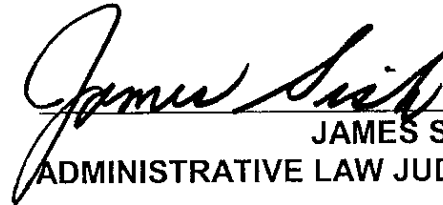
Based upon the Findings of Fact and Conclusions of Law, the ALJ finds that Respondent has violated Section 604(c) of the Code, being MCL339.604(c), and Rules 21(3) and 51(5) of the Rules, being R338.1521(3) and R338.1551(5).

Based upon the evidentiary record, also, the ALJ finds that although Respondent may have made errors in workmanship in violation of Section 2411(2)(m), he is not subject to sanction for those violations pursuant to Sections 2411(5)(e) and (f), MCL339.2411(5)(e) and (f).

PENALTY RECOMMENDATIONS


Pursuant to the Findings of Fact and Conclusions of Law, the ALJ recommends the imposition of the following penalty to the Board:

1. Require Respondent to pay a civil fine of \$2,000.00 within 60 days.
2. Suspend all licenses held by Respondent and/or any business owned by him until he pays the fine in full.


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 2nd day of January, 2009.



Julie Barbee
State Office of Administrative Hearings and Rules

Aaron J Gauthier
Gauthier & Goodrich, PC
10595 N Straits Hwy
Suite 201
Cheboygan, MI 49721

David R. Fisher
11779 M-32
Atlanta, MI 49709

John P Mack
State of Michigan
Department of Attorney General
6 Pennsylvania Plaza
Petoskey, MI 49770

Stephen J Gobbo
Bureau of Commercial Services
Compliance/Legal Unit
Enforcement Division
P.O. Box 30018
Lansing, MI 48909

Attorney General's Office
c/o Lois Hopkins
525 W. Ottawa Second floor
Lansing MI 48913

Arthur and Diane Mucciante
7624 Grand Point Road
Presque Isle, MI 49777