

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*
MARK S. MACDONALD

Docket No. 2007-1475
Complaint No. 303051

Complainant,

V
CANYON CONSTRUCTION, INC
JOHN GI FAZETTA, QUALIFYING OFFICER
License No. 21-02-065315

Respondent.

FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on September 9, 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 July 10, 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 undertherefore,

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 \$1,500.00. The fine is payable to the State of Michigan within 60 days from the mailing date of this Final Order. Complaint No. 303051 must be clearly indicated on the check or money order, and the payment sent to the Department of Labor & Economic Growth, Bureau of Commercial, Administrative Services Division, P.O. Box 30018, Lansing, Michigan 48909.

2 Respondent shall pay RESTITUTION in the amount of \$11,280.00, to Mark S. MacDonald and Caryn A. Roe -MacDonald by certified check made payable to Mark S. MacDonald and Caryn A. Roe - MacDonald and mailed to Mark S. MacDonald and Caryn A. Roe-MacDonald, 51543 Merry Lane, Shelby Twp., MI 48316, 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 within 60 days 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. It is also the intent of the Board that the fine and restitution be assessed one time in order to satisfy the Final Orders issued for complaint Numbers 303501 and 303052. Once the fine and restitution ordered in one of the companion Final Orders are satisfied, the fine and restitution ordered in the other Final Order will be considered satisfied.

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 25th day of November, 2008.

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

Date mailed: November 25, 2008

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.	2007-1474
Bureau of Commercial Services, Petitioner	Agency No.	303052
v	Agency:	Bureau of Commercial Services
John Falzetta, Respondent	Case Type:	Sanction
and		
Bureau of Commercial Services, Petitioner	Docket No.	2007-1475
v	Agency No.	303051
Canyon Construction, Inc. John Gi Falzetta, Q.O., Respondent	Agency:	Bureau of Commercial Services
	Case Type:	Sanction

**Issued and entered
this 10th day of July, 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 December 4, 2007. Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.* (APA), John Falzetta and Canyon Construction, Inc., John Falzetta, Qualifying Officer, (Respondents) were afforded an opportunity to demonstrate compliance

prior to the commencement of formal proceedings. Respondents failed to satisfactorily demonstrate compliance and, as a result, the matters were set and noticed for a formal hearing. The Notice of Hearing scheduled the contested cases to commence on February 6, 2008 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. Respondents' requested an adjournment, which was granted and re-scheduled for May 7, 2008. The undersigned Administrative Law Judge was unavailable on May 7, 2008 and these matters were re-scheduled for June 18, 2008 and the hearing proceeded as scheduled on that date. Roger E. Winkelman presided as Administrative Law Judge. Tiffany N. Daugherty, Administrative Law Specialist, appeared on behalf of Petitioner. John Makris (P17012) appeared on Respondents' behalf at the hearing. John Falzetta was present at the hearing. Mark Macdonald (Homeowner) appeared and testified at the hearing. Timothy Wood, Assistant Building Director for the Township of Shelby, appeared and testified at the hearing. Jeff Swartz (distributor and contractor for the roof) appeared and testified at the hearing. Shirley Page, office manager of Respondent, appeared and testified at the hearing.

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 of residential building. The specific issues are whether or not Respondent violated MCL 339.604(c), 1979 AC, R338.1551(4) & (5) and 2006 AACS, R338.1551(4)1, 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.

Rule 51. (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.

EXHIBITS

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Contract
2	Complaint List
3	Invoice of April 8, 2008
4	Invoice of March 13, 2007
5	Two Estimates to Replace Roof
6	Report by Assistant Building Director

Respondents did not offer any exhibits for consideration at the hearing.

1 The language of this subrule is identical to the language of the 1979 subrule.

FINDINGS OF FACT

Respondents, have at all times relevant to this Complaint, been licensed as residential builders under the Code. A Complaint against Respondents, conforming to the requirements of MCL 339.2411 has been filed with the Michigan Department of Labor & Economic Growth. An authority charged with the enforcement of the laws governing construction of residential and commercial buildings in the political subdivision in which the building is located, has submitted an evaluation of the Complaint submitted (Exhibit 6).

Respondent John Falzetta, on behalf of Respondent Canyon Construction, Inc., entered into a contract (dated September 8, 2003) to perform services regulated by the Code with Homeowner (Exhibit 1). At the outset of the hearing, it was agreed by both parties that the sole focus of this hearing would be Homeowner's Complaint concerning the workmanship of the roof. Homeowner took occupancy of the home on October 29, 2004. Homeowner had complaints about the roof and Jeff Swartz came out and repaired the new roof on: June 8, 2005, June 14, 2005, June 18, 2005, July 21, 2005, November 18, 2005, February 23, 2006, March 17, 2006, and March 18, 2006. Jeff Swartz testified that these repairs were principally in the area of the chimney and he believed that the roof was fine at that point in time.

Homeowner became very frustrated with Respondents concerning the repairs to the new roof and had Seal-Rite, another contractor; repair the blow-off shingles on March 13, 2007 and April 8, 2008. Invoices for these repair dates were submitted into evidence as Exhibit 4 (\$150.00) and Exhibit 3 (\$175.00). Please note on March 13, 2007, Homeowner had Seal-Rite take pictures of the roof and these pictures were supplied to Timothy Wood and formed the basis of Exhibit 6, Building Inspection Report, because Mr.

Wood did not go onto the roof and only inspected from below because of the steepness and lack of appropriate equipment. Please also note that Homeowner had contacted Respondents, in approximately March 2007 and was informed that they would not cover any repairs to the roof since the warranty period was over, and that Homeowner could contact Jeff Swartz directly and that Mr. Swartz "may" charge him. Homeowner never contacted Jeff Swartz at that time to find out if Mr. Swartz would perform the repair services and whether Homeowner would be charged.

As per Exhibit 6, dated March 27, 2007, Timothy Wood found violations of Section R905.1 and R905.2.6 of the 2000 Michigan Residential Code. Specifically Timothy Wood stated that "some shingles are not fastened in accordance with the manufacturer's installation instructions. In some instances, the nails are not located ½ "above cutouts and/or in line with cutouts. Some nails are not nailed flush with the shingle surface. Further, some nails are exposed." Timothy Wood testified that these problems with the roof were not confined to a narrow area of the roof. Please note that Timothy Wood also looked at the roof in April and May of 2006 and did not see any damage or blow-offs.

Jeff Swartz testified that the instructions by the roof manufacturer are only a guideline and that he installed the roof properly. Mr. Swartz stated that he thought the roof only needed some repairs for the "blow-offs" and he estimated the repairs would cost \$150.00. Mr. Swartz testified that the recent big storm on Sunday June 8th, 2008, which had winds that exceeded 60 miles per hour (the highest limit for these shingles), was really the test of whether the roof was put on well. Mr. Swartz noted that only approximately six tabs were blown loose off the roof and that he also noted a number of the other houses in that same sub-division had blow-offs as well.

Homeowner believes that he needs to replace the roof. Homeowner provided two estimates in Exhibit 5: one from Seal-Rite (whom provided the pictures to Timothy Wood and did two earlier repairs Exhibit 3 and 4) for \$11,800.00 and the other from another company for \$11, 280.00. Homeowner did not provide any evidence as to estimates to only repair the roof.

Please note there was a mediation which occurred in this matter, on or around September 19, 2007, and after which, Respondents wanted to go back on the roof, see if the roof needed repair, and to perhaps repair the roof, but Homeowner refused permission for Respondents to enter his property.

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.

The undersigned Administrative Law Judge is persuaded by the independent testimony of Timothy Wood and his report Exhibit 6. I do have some concerns: 1) Timothy Wood's was not able to personally inspect the roof by going on it, 2) Timothy Wood had to rely on pictures provided by another contractor, and 3) Timothy Woods only personal activity were his observations from the ground. However, based upon the weight of the evidence and based upon the facts described herein, Petitioner has established that Respondent violated MCL 339.604(c), 1979 AC, R338.1551(5), as described in the Formal Complaint. It is found that Respondents have not violated 1979 AC, R338.1551(4) and

2006 AACRS, R338.1551(4). Respondent responded to notice that there were problems with the roof by coming out eight (8) times to repair the roof and Respondent was under the impression that no further repairs needed to be done. Once the Building Inspector filed the report with the problems concerning the roof Respondent was not allowed by Homeowner to repair the same.

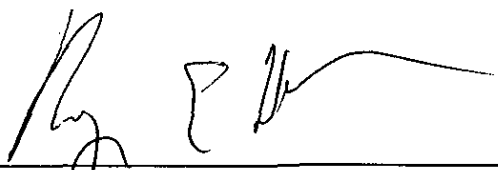
Now concerning the issue of restitution and whether the roof should be replaced. I am concerned that Homeowner did not provide evidence as to the cost and effectiveness of repairing the roof and not replacing it. However, based upon Timothy Wood's testimony that more spot repair would not be as effective in this case as replacing the roof, I am recommending that the roof should be replaced. At some point a Homeowner is entitled to have confidence in his roof and does not need to keep getting it repaired after a number of attempts.

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent has violated MCL 339.604(c), and 1979 AC, R338.1551(5) subjecting Respondent to disciplinary sanctions under Section 602 of the Code. Respondents have not violated R338.1551(4) and 2006 AACRS, R338.1551(4) because Respondents have not failed or refused to correct a structural matter that is materially deficient, dangerous, or hazardous to Homeowner. Petitioner recommended that sanctions include restitution to Homeowner in the amount necessary to provide a new roof.

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

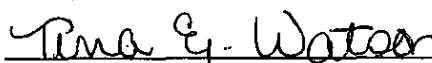
1. Payment of a civil fine in the amount that the Board deems fair and reasonable.
2. Payment of restitution to Mark Macdonald (Homeowner) in the amount of \$11,280.00 (the amount of the lowest estimate in Exhibit 5).
3. In the event the civil fine and restitution have not been paid within 60 days following 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 10th day of July, 2008.



Tina E. Watson

State Office of Administrative Hearings and Rules

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