

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

In the matter of:

JOSEPH DOYLE FECHER
License No. 21-01-059521
Former No. 21-01-4031-00

Docket No. 2002-1167
Complaint No. 9901

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on July 15, 2003 and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Stephen B. Goldstein, Administrative Law Judge, dated May 20, 2003,

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Joseph Doyle Fecher, Licensed Residential Builder, License No. 21-01-059521, hereafter "Respondent", having been found in violation of Sections 604(c); 2411(2)(m) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the "Code", MCL 339.604(c); MCL 339.2411(2)(m) and Rule 51(4) of the State Board of Residential Builders and Maintenance & Alteration Contractors General Rules, *promulgated hereunder*, 1979 AC, R 338.1551(4) and

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

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

1. Respondent shall pay only a FINE in the amount of Five Hundred Dollars and 00/100 Cents (\$500.00), because the restitution amount should be determined through civil litigation between the parties because the amount of restitution recommended in the hearing report appeared to be unjustified based on the work described; said fine to be paid to the Department of Consumer & Industry Services within sixty (60) days from the date of mailing of this Final Order. Said fine shall be paid by cashier's check or money order, with Complaint No. 9901 clearly indicated on the check or money order, made payable to the State of Michigan and sent to the Department of Consumer & Industry Services, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909.
2. Respondent's failure to comply with each and every condition of this Final Order shall result in suspension of any and all licenses held by Respondent, MCL 339.2405(3), including Joseph Doyle Fecher, Licensed Residential Builder, License No. 21-01-059521, and shall result in denial of any application for licensure, relicensure or reinstatement until the fine imposed by this Final Order is paid-in-full.
3. Respondent shall submit in writing to the Michigan Department

**of Consumer and Industry Services, Bureau of Commercial Services,
Audit Unit, P.O. Box 30018, Lansing, Michigan 48909,
proof of compliance, in a form acceptable to the Department, with
each and every requirement of this Final Order.**

This Final Order shall not be construed as limiting the Department of Consumer & Industry Services, 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 itself 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 July 2003.

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

Date mailed: _____

Proof of Compliance should be filed with:

**Department of Consumer & Industry Services
Bureau of Commercial Services
Enforcement Division
Audit Unit
P.O. Box 30018
Lansing, MI 48909**

This is the final page of a Final Order in the matter of Joseph Doyle Fecher, Licensed Residential Builder, Complaint No.9901, before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, consisting of three (3) pages, this page included.

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2002-1167

**Bureau of Commercial Services
Petitioner**

Agency No. 9901- 21-01-4031-00

v

Agency: Bureau of Commercial Services

**Joseph Doyle Fecher,
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 20th day of May, 2003
by Stephen B. Goldstein
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with the filing by the Michigan Department of Labor & Economic Growth, Bureau of Commercial Services (Petitioner) of a Formal Complaint dated May 17, 2002 against Joseph Doyle Fecher (Respondent). The Complaint alleges violations of Michigan's Occupational Code, 1980 PA 299, as amended; MCL 339.2401; MSA 18.425 (2401)-(2412) (Code).

A Notice of Hearing dated August 14, 2002 was issued and entered scheduling this matter for a formal administrative hearing to commence at 9:00 A.M. on September 20, 2002 in Lansing, Michigan. However, on August 19, 2002, the Petitioner requested that the hearing be dismissed because it wished to amend its Complaint. An Order for Dismissal of Hearing was therefore entered on August 21, 2002.

On September 20, 2002, the Petitioner filed its First Amended Formal Complaint. It appears from a review of the attachments to the Amended Complaint that it was amended to allow for an Amended Building Inspection Report to be filed along with it.

On February 3, 2003, a Notice of Remand Hearing was issued and entered, scheduling a contested case hearing for 9:00 A.M. on March 28, 2003 in Okemos, Michigan. This hearing commenced as scheduled.

Tracy Yarborough, Attorney at Law, appeared on behalf of the Petitioner. Respondent appeared and testified on his own behalf.

ISSUES AND APPLICABLE LAW

The general issue in this matter is whether Respondent violated the Code. The specific issues are whether Respondent violated MCL 339.2411(2)(m); MSA 18.425 (2411)(2)(m), MCL 339.604(c); MSA 18.425(604)(c), and 1979 AC, R 338.1551 (4). Those Sections of the Code and Rule provide as follows:

A Sec. 2411. (1) * * *

A(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 * * *

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

A * * *

ASec. 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:

A * * * @

A(c) Violates a rule of conduct of an occupation.@

A * * * @

ARule 51. (1) * * * @

A * * * @

A(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.@

A * * * @

SUMMARY OF EXHIBITS

During the hearings held in this matter, the following exhibits were offered, all of which were admitted into the record:

Petitioner Exhibit 1 is a copy of the purchase agreement between Respondent and Denise Neubauer (Complainant), dated November 22, 2000.

Petitioner Exhibit 2 is a copy of the July 5, 2001 Statement of Complaint filed by the Complainant.

Petitioner Exhibit 3 is a copy of a Proposal compiled by

Marchbanks Cement Work. The Proposal was submitted to the Complainant, is dated June 29, 2001, and is in the amount of \$3,643.00.

Petitioner Exhibit 4 is a copy of a Proposal compiled by Refined Concrete Waterproofing. The Proposal was submitted to Complainant, is dated July 16, 2002, and is in the amount of \$11,380.00.

Petitioner Exhibit 5a is a copy of the initial Building Inspection Report filed with the Petitioner's Formal Complaint.

Petitioner Exhibit 5b is a copy of the Amended Building Inspection Report filed with the Petitioner's First Amended Formal Complaint.

Petitioner Exhibit 6 is a copy of the December 5, 2001 Repair/Correction Notice to Respondent.

Petitioner Exhibit 7 photographs of Complainant's basement area.

Petitioner Exhibit 8 photographs of Complainant's driveway.

Respondent Exhibit A excerpt from a page out of the National Association of Home Builders, 3rd Edition, dealing with concrete driveways.

Respondent Exhibit B is a copy of an excerpt from the Michigan Building Code section dealing with Minimum Specified Compressive Strength of Concrete Subject to Weathering or Deicer Chemicals.

Respondent Exhibit C is a copy of a letter from Steve Schupbach, Vice President, Ken's Redi-Mix, Inc., regarding the materials used on in installing Complainant's driveway.

Respondent Exhibit D are numerous photographs of the exterior of the Complainant's home, including photographs of the driveway area.

SUMMARY OF TESTIMONY and FINDINGS OF FACT

On or about November 22, 2000, Respondent entered into a purchase agreement to sell to Denise Neubauer (Complainant) a residential structure which was constructed by and under the license of the Respondent, and which construction was regulated by the Code.

Denise Neubauer (hereafter AComplainant@) testified she contacted the Respondent, and, after viewing the home, decided to enter into a purchase agreement (*Petitioner Exhibit 1*) with the Respondent. The purchase price of this home was \$150,000.00, and the contract was entered into on November 22, 2000. She moved into the home in December, 2000.

The Complainant testified that, shortly after moving into the home, she went on vacation, and then, in early January 2001, noticed things were wrong with the home. She indicated the first thing she noticed was that there was a leak in the corner of the basement. She further testified she immediately went outside and began shoveling snow away from that corner of the home. Complainant stated that, on January 15, 2001, she called the Respondent to inform him of the problem, but never received a response. She further indicated that January 15, 2001 was the third time she had called the Respondent but received no response.

The Complainant stated that, on February 10, 2001, she again called the Respondent at which time she spoke with him; he agreed to come out to the home and look at the problems she was experiencing with the basement. The Complainant further stated that, by May 9, 2001, she noticed there were also problems with her driveway, so on that day, she

contacted him again. The Complainant also indicated she sent two written communications to the Respondent by certified letter, return receipt requested, and that, both times, he signed for the letters.

The Complainant testified she eventually filed her Statement of Complaint (*Petitioner Exhibit 2*). She indicated that, after the complaint was filed, the Respondent came out to her home on Mothers Day, 2001 and looked at the problems she was experiencing. She stated the Respondent told her he did nothing wrong with regard to the driveway, and that she should put a sealant on the driveway. At this point, the Complainant contacted the building inspector, Lee Whalen, to come out to her home to view the problems.

The Complainant testified she contacted other contractors to look at the problems with the driveway and basement. *Petitioner Exhibits 3 and 4*, both of which were admitted into the record, are proposals supplied to the Complainant to repair the issues associated with these problems.

LeRoy T. Whalen testified is a Richfield Township building inspector, and that he was involved in performing an inspection on the Complainant's home. He has occupied this position for approximately 10 years. Prior to his current position, he was a building inspector for the City of Davison, and, prior to that, was a licensed builder. Mr. Whalen was offered and admitted as an expert witness in the area of general building construction.

Mr. Whalen testified he first performed an inspection of the Complainant's home on May 21, 2001. He cannot recall if he had a copy of the Petitioner's complaint at that time, but indicated he was not influenced by the Complainant whatsoever while performing his

inspection.

Mr. Whalen testified he compiled two inspection reports, both of which were admitted into the record as *Petitioner Exhibits 5a and 5b*. He indicated his first report (5a) failed to include an indication of whether the basement crack issues were violative of a code section or were merely workmanship issues.

Mr. Whalen stated he observed both the driveway and basement. With regard to the driveway, he testified there were spots in this area (the upper panels) where the concrete was shaling, which exposes the aggregate below this level. He concluded this problem was the result of workmanship violations.

With regard to the basement, Mr. Whalen testified he found a crack in the corner of the basement, and that it was revealing some evidence of water filtration through the crack. He said this problem must be addressed because the situation will only get worse if it's not fixed. He also concluded that, because basement cracks are not that unusual a problem, it was a workmanship violation because the Respondent failed to return to the Complainant's home to address the problem. He also concluded the shaling on the driveway concrete was a workmanship violation because, had it been installed correctly, the problem would not have occurred.

Mr. Whalen testified that, with regard to addressing the driveway, there are two upper driveway sections, which need to be repaired; with regard to the basement, the problem is located in a critical area, and that, because of this fact, the area needs to be dug up. He therefore believes it should cost a few hundred dollars to have the area dug up and repaired.

However, Mr. Whalen was hesitant to state, with any degree of certainty, how much it should cost to have this work done.

On cross-examination, Mr. Whalen acknowledges he did not perform any type of compression testing to determine the strength of the concrete installed on this driveway. Mr. Whalen also acknowledges that, when he did the final inspection (prior to occupancy) of this property in April, 2000, the driveway concrete looked fine, and that there didn't appear to be any problems with it.

The Respondent testified on his own behalf at the March 28, 2003 hearing. He indicated that, after the Complainant purchased this home, she occupied the premises approximately 10 days before the actual closing, and not one day as the Complainant claims.

The Respondent claims he returned her messages several times, and acknowledges telling her to buy sealant for both the driveway and the basement. He also acknowledges meeting with Mr. Whalen at the site on at least one (1) occasion, and that they disagreed over how to address the problems with the Complainant's home.

The Respondent believes he did nothing wrong with the installation of the driveway, and that the problems were caused by the Complainant parking heavy objects on the surface before it was ready for such use. He introduced into the record *Respondent Exhibits A, B and C* in support of his position on this issue. All of these exhibits were admitted into the record.

With regard to the basement issue, the Respondent acknowledges observing a hairline crack, but denies seeing any evidence of water in this area. He offered no further

evidence in his defense on this issue.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative proceedings. 8 Callaghan's Michigan Pleading & Practice, 2d ed, ' 60.48, p 280.

The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that Respondent violated the Code. 1990 AACRS, R 339.1763.

VIOLATION OF SECTION 2411(2)(m) OF THE CODE

By this charge, the Petitioner asserts that Respondent's performance of the subject matter driveway and basement foundation work was not accomplished in a workmanlike manner.

The evidence presented establishes that the basement foundation on Complainant's home continues to leak. Case law in Michigan appears to support the proposition that workmanship issues are not cured merely because a contracting party later corrects what he was under an initial duty to do right the first time. In *Arndt v State of Michigan*, 147 Mich App 97 (1985), the Court of Appeals specifically held that a builder is under a duty to perform the terms of a contract in a workmanlike manner from the outset of the contract until its terms are satisfied. The *Arndt* court also held that a homeowner preventing a builder from correcting the problem is no defense to the workmanship violation itself.

Respondent presented no significant contradictory evidence on the basement foundation issue. He was under an absolute duty to assure it was installed correctly at the outset, but that if cracks appeared at some later date, he immediately addresses them in an

expedient manner. The evidence presented the cracks and leaks were brought to the Petitioner's attention shortly after the Complainant took possession of the dwelling, but that he took no immediate action to address this issue.

Under the foregoing analysis, this Judge finds and concludes that Respondent has violated Section 2411(2)(m) of the Code with regard to the basement foundation cracks.

With regard to the concrete shaling and spalling on the driveway, this Judge finds no violation. Inspector Whalen testified he observed shaling on the concrete driveway, however, he performed no pressure test to determine the strength of the concrete. He also has limited knowledge of what may have been placed on the driveway before it was ready for such use.

The Respondent presented credible testimony to establish there are numerous factors and considerations at play with regard to what may cause such processes to occur on concrete surfaces, including weather conditions and premature usage.

Accordingly, no violation of Section 2411(2)(m) is found with regard to the concrete driveway issue.

VIOLATION OF 1979 AC, R 338.1551(4)

By these charges, Petitioner asserts that Respondent failed to respond to the Statement of Complaint filed by Complainant, and failed to correct those items justified by the building inspector involved in this case within a reasonable time.

The preponderance of the evidence establishes that the problems associated with the basement foundation cracks were not addressed within a reasonable time. The

preponderance of the evidence also establishes that Respondent failed to respond to the Statement of Complaint filed by the Complainant.

Respondent claims the basement foundation cracks were not included in the Petitioner's original complaint or attached building inspection report. However, a review of the original building inspection report clearly indicates the basement crack issues were noted. Therefore, the Respondent's claims of improper notification are without merit.

Accordingly, this Judge finds and concludes that Petitioner established, by a preponderance of the evidence, that Respondent violated 1979 AC, R 338.1551(4).

VIOLATION OF SECTION 604(c) OF THE CODE

Based upon this Judge's previous findings and conclusions, a violation of this Section of the Code is also found on this record. Accordingly, the Petitioner established, by a preponderance of the evidence, that Respondent has violated a rule of conduct in practicing his occupation and has therefore violated Section 604(c) of the Code.

SUMMARY

The preponderance of the evidence presented in this case establishes that Respondent has violated Section 2411(2)(m) of the Code, and Rule 51(4). Therefore, he has also violated Section 604(c) of the Code.

RECOMMENDED SANCTIONS

This Administrative Law Judge recommends that the following sanctions be included:

1. That Respondent be assessed a Civil Fine in the amount of \$500.00 for his violation of Section 2411(2)(m) and therefore Section 604(c) of the Code, and for his violation of Rule 51(4).

2. That Respondent be ordered to pay to Complainant restitution in the amount of \$11,380.00 to repair and/or replace deficiencies related to the basement foundation installation. This recommendation is taken directly from *Petitioner Exhibit 4*, the estimate for repairs to the basement foundation walls.
3. That any and all licenses presently held by Respondent in either an individual or corporate capacity be suspended if the fine and restitution are not paid within 60 days of the Final Order of the Board of Residential Builders and Maintenance and Alteration Contractors.
4. That no new licenses issue to Respondent in either an individual or corporate capacity until such time as Respondent has complied in full with the Final Order of the Board.

STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE