

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of S.L. Anderson, Inc.,  
License No. BC4883

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 29, 2003, at 9:30 a.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce ("the Department"). Philip K. Jacobson, Attorney at Law, Kelly & Jacobson, 220 South Sixth Street, Suite 215, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent, S.L. Anderson, Inc. The Department submitted a post-hearing letter brief on June 16, 2003, and the Licensee submitted a post-hearing letter brief on June 23, 2003, at which time the OAH record closed.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

**STATEMENT OF ISSUES**

The issues presented in this case are whether the Respondent, S.L. Anderson, Inc., failed to satisfy a judgment against it and whether the Respondent has thereby been shown to be incompetent, untrustworthy, or financially irresponsible, in violation of Minn. Stat. § 326.91, subd. 1(6), and, if so, whether the Respondent's residential building contractor license should be revoked or suspended or whether the Respondent is otherwise subject to discipline and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6 - 7, and 326.91.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. The Respondent, S. L. Anderson, Inc., has been in the home construction business for approximately 41 years and has held a Minnesota building contractor license since licensure became available approximately ten years ago. The Respondent also holds a Wisconsin building contractor license. Steven Anderson is the President and sole stockholder of S.L. Anderson. The present case reflects the first time that anyone has filed a complaint regarding the Respondent. Testimony of S. Anderson.

2. The Respondent currently specializes in the construction of log homes. About 1/3 of the approximately 35 log homes that the Respondent has built have had values in excess of \$1 million. Testimony of S. Anderson.

3. In approximately August of 1998, Mark and Beverley Anderson entered into a contract with the Respondent to build a 5,000 square foot log home with an all-steel roof for the Andersons in Hudson, Wisconsin. The Respondent served as general contractor under the contract. The house was built under a Wisconsin building permit. The Andersons moved into the house in approximately July 2000. Testimony of M. Anderson, S. Anderson; see also Ex. 2 (change order reflecting installation of a standing seam metal roof on entire house, two porches, and garage).

4. Ms. Anderson was a resident of Minnesota at the time that the contract was signed and during the time the house was being built. Once Ms. Anderson's property in Minnesota was sold, the Andersons moved to Wisconsin. Testimony of M. Anderson.

5. During the winter of 2000-01, water began leaking in from the roof of the Andersons' home. The Andersons called the Respondent. The Respondent came to the Andersons' home and told the Andersons that the house probably needed to be caulked and they shouldn't worry. The leaking continued to get worse during the winter. The Andersons and the Respondent disagreed regarding what should be done to remedy the problem. Testimony of M. Anderson.

6. The Andersons eventually hired an attorney and called in structural engineers to examine the roof. They discovered that no water shield had been installed and that there were other issues regarding the way in which steel had been applied to the roof. Ice dams formed and caused water to leak in around the chimney and in the valleys and eaves of the roof. Mold was growing inside the decking, and water was

leaking into the logs. They were told that the entire roof needed a rubber underlayment and that the flashing around the chimney needed to be repaired. Testimony of M. Anderson, S. Anderson.

7. The Andersons took legal action regarding the roof and an additional dispute between the parties about alleged discrepancies in billing and the final amounts owed. Both parties eventually decided not to pursue the billing dispute. The issue relating to the roof eventually went to binding arbitration. The Respondent was accompanied to the arbitration hearing by the attorney who represented him in the present contested case proceeding. The parties engaged in settlement discussions before the start of the hearing. The Respondent believed that it was technically feasible to salvage the old roof. The Respondent offered to lift the roof, install a rubber underlayment, fix the leaking at the chimney, and put the old roof back. The Andersons did not believe that the old metal roof could be salvaged. They wanted the old roof discarded and a new roof installed, in accordance with advice they had received from their experts. The Andersons thus did not accept the Respondent's offer. The Respondent's business was in financial distress at the time, and the Respondent told the Andersons that he was financially unable to put on a new roof or pay the legal and expert costs associated with continuing with the arbitration. When settlement discussions were unsuccessful, the Respondent and his attorney walked out because the Respondent decided that it could not afford to fight. The matter proceeded without the Respondent and the Andersons obtained a default judgment after presenting evidence from Les Jones and a roofing expert explaining what was wrong with the roof installed by the Respondent and what it would cost to remove and replace the roof. The arbitrator awarded an amount in excess of \$90,000 to the Andersons against Respondent. The judgment was docketed in Carver County on December 5, 2001. The Respondent did not appeal the arbitration award and has not made any payment to the Andersons in connection with the award. Testimony of M. Anderson, S. Anderson.

8. Eventually, the Andersons had the entire roof replaced by Les Jones Roofing Company. The Andersons paid approximately \$10,000 to secure the roof during the winter and approximately \$93,000 to have the roof redone. Testimony of M. Anderson.

9. The Anderson home was the first time that the Respondent had installed a metal roof. The metal roof was installed in conformity with the manufacturer's instructions for that roof at the time. When the Respondent later consulted with the manufacturer concerning the problems with the Andersons' roof, the manufacturer said that the requirements had been changed to include installation of a rubber underlayment or ice and water shield at the valleys and eaves, because the industry as a whole had experienced similar problems. Other roofers told the Respondent that they had had the same type of problem with leaking and had to learn the hard way how to install the metal roof. Testimony of S. Anderson.

10. Some financial difficulties are associated with construction of log homes. For example, much more specialized equipment is required than in regular home construction, and more extensive training and good wages must be provided in order to keep employees. The Respondent tries to keep a core crew of 4-5 employees busy and

on the payroll during lean times so as not to lose them, since it is not feasible to go to the union hall and hire just anyone. The Respondent thus struggles to keep its core crew busy and working to avoid lay-offs. Due to the need to maintain the core crew, the Respondent sometimes takes on work at a lower profit just to keep busy. Testimony of S. Anderson.

11. It turned out that the Respondent underbid the Andersons' home. The Respondent took a loss of over \$257,000 in connection with building that home. Testimony of S. Anderson; Ex. 1.

12. The Respondent has never made \$100,000 in net profit during any of the past ten years in the log home business. Prior to construction of the Andersons' home, the Respondent made approximately \$40,000 to 50,000 per year after all expenses had been deducted and before taxes. Testimony of S. Anderson.

13. The Respondent has paid off about \$100,000 in debt related to the construction of the Andersons' home during the last two years, primarily by making payments to suppliers. The Respondent remained more than \$150,000 in debt at the time of the contested case hearing. The Respondent had used a different attorney prior to the Anderson arbitration. The Respondent still owes that attorney money and is making monthly payments of \$350 to \$500 when possible to decrease the amount owed. The Respondent has paid the attorney a couple thousand dollars total thus far. The Respondent has not, however, made any payments to the Andersons in connection with the arbitration award. Testimony of S. Anderson.

14. The Andersons have not sought the imposition of disciplinary action against the Respondent in Wisconsin. Testimony of M. Anderson.

15. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges initiating this contested case proceeding was served upon the Respondent by mail on November 22, 2002.

16. The Department announced at the beginning of the hearing that it would not pursue Count II as originally set forth in the Notice of and Order for Hearing, in which it was alleged that the Respondent had provided false, misleading or incomplete information to the Commissioner in violation of Minn. Stat. § 45.027, subd. 7(3). Count II was, therefore, dismissed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges issued by the Department was proper and the Department has fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Department bears the ultimate burden to show by a preponderance of the evidence that the Respondent's license should be disciplined.

4. Under Minn. Stat. § 326.91, subd. 1(6), the Commissioner may order disciplinary action against a license or censure a licensee and may impose a civil penalty if the Commissioner "finds that the order is in the public interest, and that the . . . licensee . . . or other agent, owner, partner, director, governor, shareholder, member, officer, qualifying person, or managing employee of the . . . licensee . . . has been shown to be incompetent, untrustworthy, or financially irresponsible."

5. By failing to satisfy a judgment obtained against it by a customer, the Respondent has been shown to be financially irresponsible in violation of Minn. Stat. § 326.91, subd. 1(6). The Respondent is subject to discipline and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6 - 7, and 326.91, and the imposition of sanctions is in the public interest.

6. These Conclusions are reached for the reasons set forth in the attached Memorandum, which is incorporated in these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against the residential building contractor license of S.L. Anderson, Inc., and impose an appropriate civil penalty.

Dated: July 23, 2003

/s/ Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

**NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

Reported: Tape recorded.

## MEMORANDUM

There is no dispute that an arbitration award was issued against the Respondent, S. L. Anderson, in 2001 after the Respondent defaulted in that proceeding, that the award was docketed as a judgment in Carver County in late 2001, and that the Respondent has not satisfied this judgment or made any payments in partial satisfaction of the judgment. The Respondent contends, however, that it would be inappropriate for the Commissioner to impose discipline against its license based upon its failure to satisfy the judgment.

As a threshold matter, the Respondent argues that Minn. Stat. § 326.91, relating to discipline of licensed building contractors, does not apply here because the construction project that formed the underlying basis for the arbitration and eventual judgment occurred in Wisconsin, under a Wisconsin building permit and the Respondent's Wisconsin licensure. The Administrative Law Judge concludes that this argument must fail. The statute does not expressly limit its scope to construction projects that occur in Minnesota and it is evident that conduct committed by contractors outside Minnesota may affect their suitability to hold a Minnesota license or warrant disciplinary action against that license. It is appropriate to authorize the imposition of discipline against Minnesota licensed building contractors who engage in misconduct regardless of where that misconduct occurred, and thereby protect Minnesota consumers who might otherwise be victimized by similar misconduct. This is particularly true here, where the construction project occurred just across the Minnesota border in Hudson, Wisconsin, one of the homeowners was a Minnesota resident, the arbitration occurred in Minnesota, and the judgment was docketed in Minnesota. Under these circumstances, the fact that the underlying construction project happened to be located in Wisconsin cannot insulate the Respondent from any disciplinary consequences in Minnesota.

Secondly, the Respondent contends that its failure to pay a judgment obtained by a customer is not proper grounds for the imposition of discipline under the statute. The Respondent points out that Minn. Stat. § 326.91, subd. 1(12), authorizes the imposition of discipline if a licensee or its owner or qualifying person "has had a judgment entered against them for failure to make payments to employees or subcontractors, and all appeals of the judgment have been exhausted or the period for appeal has expired." (Emphasis added.) Under the doctrine of *expressio unius est exclusio alterius*,<sup>[1]</sup> the Respondent argues that the Legislature did not intend that an unpaid judgment against a contractor obtained by a single customer would be sufficient to warrant the imposition of discipline. Even though the Department seeks the imposition of discipline under the "catch-all" provision set forth in Minn. Stat. § 326.91, subd. 1(6), and not under subd. 1(12), the Respondent contends that it would not make sense for the Legislature to list in item 12 only unpaid judgments obtained by employees or subcontractors as a basis for discipline if it intended in item 6 to make any unpaid judgment a basis for discipline. The Respondent thus asserts that it would be improper to extend the application of the statute to unpaid judgments obtained by customers. The Respondent argues that the Legislature surely would have so indicated if it intended that discipline could be imposed

based on unpaid judgments held by the wide variety of entities with whom contractors do business (such as material suppliers, customers, landlords, vendors, service people, and professional advisers). The Respondent further contends that the Department's interpretation of the statute would afford the Commissioner too much discretion without a proper basis in the statute.

The doctrine of *expressio unius est exclusio alterius* is "only used where it is first determined that the language [of the statute] is ambiguous."<sup>[2]</sup> Minn. Stat. § 326.91, subd. 1(6), specifies that discipline may be imposed if the licensee or its owner or qualifying person "has been shown to be incompetent, untrustworthy, or financially irresponsible." Minn. Stat. § 326.91, subd. 2, specifies that "[n]othing in this section prevents the commissioner from denying, suspending, revoking, or restricting a license, or from censuring a licensee based on acts or omissions not specifically enumerated in this subdivision." Thus, the Legislature made it clear in Minn. Stat. § 326.91 that the Commissioner's disciplinary powers extended beyond the particular violations enumerated in the statute. The language of the statute is not ambiguous in this regard, and it is not necessary to apply maxims of statutory interpretation.<sup>[3]</sup> It is only necessary to determine whether the Respondent's failure to satisfy its customers' judgment demonstrates that the Respondent is financially irresponsible within the meaning of subdivision 1(6). As discussed below, the Administrative Law Judge concludes that it does.

The Respondent argues that the facts and law do not in any event justify a finding that it is financially irresponsible. The Respondent points out that it has been in the home construction business for more than forty years and has never before been the subject of a complaint. The Respondent also contends that the unpaid judgment arose from a failed metal roof system installed in accordance with the manufacturer's instructions and that the roof failure was caused by the manufacturer's design errors, not the Respondent's negligence; the installation of an entirely new roof was not necessary; the amount of the judgment was more than three times the bid price of the original roof; the legal and expert witness fees need to defend the Respondent's position in the arbitration proceeding were too burdensome to warrant its participation; the Respondent took a loss of more than \$250,000 on the Andersons' home so the customers received a "windfall" in any event; and there is no evidence that the public interest would be served by the imposition of discipline against the Respondent. In response, the Department contends that the Respondent's argument that a financially distressed contractor is free not to contest claims asserted by customers and thereafter free not to pay the resulting judgments is preposterous. The Department asserts that financially responsible residential building contractors are able to devote the resources necessary to contest customer claims and, if unsuccessful, pay the resulting judgment, and argues that the Respondent cannot choose not to contest an arbitration and later question the basis for the resulting award. The Department contends that it is apparent that the Respondent lacks the financial responsibility necessary to address whatever difficulties are presented by the log home construction business.

The mitigating evidence and arguments raised by the Respondent may be considered by the Commissioner in determining what, if any, discipline should be imposed in this matter, along with the Respondent's evidence concerning the impact that it asserts the imposition of discipline would have on its business.<sup>[4]</sup> However, the fact remains that the Respondent chose not to participate in the arbitration proceeding after the Andersons rejected its final settlement offer, did not appeal the award, and cannot properly question the validity or amount of the resulting judgment in the current contested case proceeding.<sup>[5]</sup> The Respondent has not only failed to satisfy the judgment but has failed to make any payment on that judgment since it was docketed in December of 2001 or indicate any intention of doing so. Despite the Respondent's arguments that it lost money on the Anderson project, the log home construction business presents unique difficulties for contractors, and it is unable to pay the Andersons due to its financial distress, the Respondent has, in fact, found a way to pay off a significant portion of its debt to suppliers and is making monthly payments to decrease the amount owed its former attorney. The Respondent has made absolutely no payments to the Andersons, and did not indicate at the hearing that it had any intention of doing so. The Administrative Law Judge finds that the Respondent has demonstrated financial irresponsibility by failing to satisfy the judgment and that the imposition of discipline has been shown to be in the public interest, to protect other consumers from similar misconduct.

### **B.L.N.**

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<sup>[1]</sup> *Expressio unius est exclusio alterius* is a maxim of statutory interpretation that means "to express or include one thing implies the exclusion of the other." Black's Law Dictionary 602 (7<sup>th</sup> ed. 1999). See also Minn. Stat. § 645.19 ("Exceptions expressed in a law shall be construed to exclude all others").

<sup>[2]</sup> *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 397 (Minn. App. 2001), *rev. granted* (Jan 15, 2002), *citing Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 17-18 ((Minn. App. 1999), *rev. denied* (Minn. Oct. 21, 1999)).

<sup>[3]</sup> As noted in Minn. Stat. § 645.16, "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."

<sup>[4]</sup> Although the Respondent is still in the log home construction business and is presently working on a \$1 million log home, Steven Anderson, the Respondent's owner, testified at the hearing that the Respondent cannot afford to pay the Andersons' judgment and remain in business at the present time. If the Respondent lost its license and was forced to shut down its business, it is possible that Steven Anderson would file bankruptcy with respect to S.L. Anderson and start work under a new company in order to keep his core crew working.

<sup>[5]</sup> Although the Respondent may very well have been able to present evidence at the arbitration hearing that would have led to a different outcome or a lesser award, the Respondent allowed the matter to proceed as a default and did not file any appeal. The current contested case proceeding is not the proper place for the Respondent to argue that the judgment was unwarranted or inflated.