

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Nest Builders LLC and Timber Land Company	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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The above-entitled matter came on for hearing before Administrative Law Judge Linda F. Close (the ALJ), on May 8, 2007, at the Office of Administrative Hearings, 100 Washington Ave. S., Minneapolis, MN 55401-2138. The hearing was held pursuant to a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges, (Notice of Hearing) dated October 4, 2006. The Notice of Hearing was amended through a Second Amended Statement of Charges signed on April 20, 2007.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota St., #1200, St. Paul, MN 55102-2130, appeared on behalf of the Department of Labor and Industry (Department). John C. DeMoss, Esq., 6950 France Ave. South, #100, Edina, MN 55435-2024, appeared on behalf of the Respondents Timber Land Company (Timber Land) and Nest Builders LLC (Nest Builders).

### STATEMENT OF THE ISSUES

1. Did Respondent Timber Land violate Minn. Stat. § 326.91, subd. 1 (8) by failing to pay a subcontractor for plumbing services?
2. Did Respondent Timber Land violate Minn. Stat. § 45.027, subd. 1a by failing to respond to the Department's requests for information?
3. Has Respondent Timber Land demonstrated financial irresponsibility, in violation of Minn. Stat. § 326.91, subd. 1(6), by failing to satisfy judgments?
4. Did Respondent Nest Builders violate Minn. Stat. § 326.91, subd. 1 (8) by failing to pay a subcontractor for plumbing services?

5. Did Respondent Nest Builders violate Minn. Stat. § 45.027, subd. 1a by failing to respond to the Department's requests for information?

6. Has Respondent Nest Builders demonstrated financial irresponsibility, in violation of Minn. Stat. § 326.91, subd. 1(6), by failing to satisfy judgments?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### FINDINGS OF FACT

1. Respondent Nest Builders and Timber Land are residential construction companies operated by Larry Allar. Both were in business as of two years ago, but Timber Land stopped doing any business at that time.<sup>1</sup> Timber Land's license from the Department expired at the end of March 2007. Nest Builders remains in business and is currently licensed by the Department.<sup>2</sup>

2. The Department requires licensees to take a test before becoming licensed. Each business entity has a qualifying person who takes the test, is responsible for continuing education, and answers for the entity's conduct of its affairs. When one individual is the qualifying person for more than one licensed entity, the Department imputes any misconduct of one licensed entity to the other. Larry Allar is the qualifying person for both Nest Builders and Timber Land.<sup>3</sup>

3. Sometime in late 2005, Westonka Mechanical Contractors (Westonka) filed a complaint against both Nest Builders and Timber Land for failure to pay Westonka for its plumbing work on two jobs. On December 21, 2005, the Department sent letters, signed by the Department's senior investigator Gregg LeCuyer, to Nest Builders and Timber Land. The letters asked each entity to respond to the complaint and requested responses to the Department by January 5, 2006.<sup>4</sup>

4. By January 18, 2006, the Department had received no responses from either Nest Builders or Timber Land. On that date, LeCuyer sent a second letter to each of the Respondents. The letters informed Respondents that they must provide written responses to the complaint of Westonka by January 31, 2006.<sup>5</sup>

5. On February 3, 2006, Allar called LeCuyer. He told LeCuyer that he would hand deliver the written responses on February 6<sup>th</sup>. Allar did not

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<sup>1</sup> Testimony of Larry Allar.

<sup>2</sup> Testimony of Gregg LeCuyer.

<sup>3</sup> Test. of G. LeCuyer.

<sup>4</sup> Test. of G. LeCuyer; Ex. 1-2.

<sup>5</sup> Test. of G. LeCuyer; Ex. 3-4.

provide the responses on February 6<sup>th</sup>.<sup>6</sup> In December, Allar had been ill with pneumonia.<sup>7</sup> Allar believes he told that to LeCuyer when the two spoke in February, but LeCuyer does not recall being told of Allar's illness.<sup>8</sup>

6. On April 4, 2006, Lecuyer received a telephone message from Allar. LeCuyer sent Allar an email to set up a meeting for April 11<sup>th</sup>. The two did meet on April 11, at which time Allar provided responses to the Westonka complaint.<sup>9</sup>

7. At the April 11<sup>th</sup> meeting, Allar and LeCuyer discussed judgments that Westonka had recently obtained against Nest Builders and Timber Land. The judgment against Nest Builders totaled \$6,034.81 and the one against Timber Land amounted to \$5,432.63. Allar told LeCuyer that Westonka had charged too much for its work, and that was why Nest Builders and Timber Land had not paid Westonka the full amount it charged.<sup>10</sup>

8. At the time when Westonka obtained the judgments, Allar was working with Westonka to resolve the disputes. The Parties agreed to continue the original court dates for the cases Westonka had filed, but Allar did not receive notice of the new court dates. As a result, the judgments were entered by default. Westonka and Nest Builders have reached an agreement about the amount to be paid to satisfy the judgments against Nest Builders and Timber Land. The judgments had not been satisfied by the date of the hearing.<sup>11</sup>

9. Sometime after the April 11<sup>th</sup> meeting, LeCuyer discovered six more judgments against Timber Land. The name of the judgment creditors, the dates of judgment entry and the judgment amounts are as follows:

Sheridan Sheet Metal	01/31/2003	\$ 7,126.79
Automated Lifestyles	05/23/2002	\$ 7,546.39
Waterproofing, Inc.	11/02/2002	\$ 3,305.68
Kings Marble	01/31/2007	\$ 1,140.10
Tabery Tile, Inc.	06/22/2006	\$ 7,555.00
Multiple creditors	03/06/2002	\$189,010.47 <sup>12</sup>

10. The last judgment listed above relates to Timber Land's construction of a luxury home in Golden Valley, Minnesota in 2002. Allar expected the home to sell for more than one million dollars. Allar borrowed money for the project from State Bank of Long Lake. When the home failed to sell, Allar could not keep up payments on the loan. The Bank and several

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<sup>6</sup> Test. of G. LeCuyer.

<sup>7</sup> Test. of L. Allar.

<sup>8</sup> Test. of G. LeCuyer; Test. of L. Allar.

<sup>9</sup> Test. of G. LeCuyer.

<sup>10</sup> Test. of G. LeCuyer; Ex. 7.

<sup>11</sup> Test. of L. Allar.

<sup>12</sup> Test. of G. LeCuyer; Ex. 7.

subcontractors then foreclosed, resulting in the large judgment shown. Allar continues to pay the Bank \$1,300.00 per month to repay Timber Land's debt to the Bank. In addition, Allar has paid most of the subcontractors.<sup>13</sup>

11. Thomas D. Johnson, vice-president of Bridgewater Bank in Bloomington, Minnesota, submitted a letter for the record. Johnson has had ten years of banking experience with Allar. His letter attested to Allar's integrity in making monthly payments to the bank loan for the failed Golden Valley project. Johnson's bank has continued to finance Allar's projects because of their confidence in Allar.<sup>14</sup>

12. The sales manager of Chaska Building Center also submitted a letter for the record. The sales manager has worked with Allar for ten years. He favorably remarked on the high quality of Allar's work and Allar's pursuit of new construction techniques.<sup>15</sup>

13. Two of Nest Builders' subcontractors submitted letters for the hearing. They attested to being paid timely and to the quality of Allar's work. A homeowner for whom Nest Builders had constructed a 1.5 million dollar home also wrote of his satisfaction with the quality of Allar's work.<sup>16</sup>

14. At the present time, Nest Builders is engaged in building a 1.8 million dollar town home project in Victoria, Minnesota.<sup>17</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 45.027, 326.91, 14.50, and Executive Order 193.

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

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<sup>13</sup> Test. of L. Allar; Ex. 8.

<sup>14</sup> Ex. 8.

<sup>15</sup> Ex. 8.

<sup>16</sup> Ex. 8; Test. of L. Allar.

<sup>17</sup> Test. of L. Allar.

4. As the party proposing that certain action be taken, the Department has the burden of proving facts at issue by a preponderance of the evidence.<http://www.oah.state.mn.us/aljBase/602017359.rt.htm> - ftn29<sup>18</sup>

5. The Department has shown, by a preponderance of the evidence, that Respondent Timber Land is financially irresponsible, in violation of Minn. Stat. § 326.91, subd. 1(6), by virtue of the existence of seven judgments against it.

6. The Department has shown, by a preponderance of the evidence, that Respondent Timber Land failed to respond timely to the Department's request for information, in violation of Minn. Stat. § 45.027, subd. 1a.

7. The Department has failed to show, by a preponderance of the evidence, that Respondent Timber Land violated Minn. Stat. § 326.91 subd. 1(8) by failing to pay a subcontractor for plumbing services.

8. The Department has shown, by a preponderance of the evidence, that Respondent Nest Builders is financially irresponsible, in violation of Minn. Stat. § 326.91, subd. 1(6).

9. The Department has shown, by a preponderance of the evidence, that Respondent Nest Builders failed to respond timely to the Department's request for information, in violation of Minn. Stat. § 45.027, subd. 1a.

10. The Department has failed to show, by a preponderance of the evidence, that Respondent Nest Builders violated Minn. Stat. § 326.91, subd. 1(8) by failing to pay a subcontractor for plumbing services.

11. The Department has shown, by a preponderance of the evidence, that discipline of Respondents is in the public interest.

12. Minn. Stat. § 326.91 empowers the Commissioner to take disciplinary action against the Respondents as a result of the Respondents' violations of Minn. Stat. §§ 45.027, subd. 1a and 326.91, subd. 1(6).

13. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

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<sup>18</sup> Although Timber Land no longer holds a license, the Department may take disciplinary action for two years after the license expiration. See Minn. Stat. § 45.027, subd. 11. Minn. Stat. § 45.027 applies to actions of the Department of Labor and Industry by virtue of Executive Order 193.

## RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: that the Commissioner of the Minnesota Department of Labor and Industry take appropriate disciplinary action against the Respondents' licenses.

Dated: June 4, 2007

s/Linda F. Close  

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LINDA F. CLOSE  
Administrative Law Judge

Reported: Taped, 1 tape(s)  
No transcript prepared

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) 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 Nancy Leppink, General Counsel, Minnesota Department of Labor and Industry, 443 Lafayette Road N. St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

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. In order to comply with this statute, 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. 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.

Under 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.

## MEMORANDUM

### ***Financial Irresponsibility***

Minn. Stat. § 326.91, subd. 1(6) permits the Department to take disciplinary action against a licensee who demonstrates financial irresponsibility. The Department has met its burden of showing financial irresponsibility on the part of both Timber Land and Nest Builders.

Timber Land accumulated seven judgments against it spanning a four-year period. The first of these judgments amounted to nearly \$200,000.00 and included the claims of many creditors who suffered losses on account of Timber Land's gamble on building a luxury home in Golden Valley. Other judgments appear to relate to unpaid debts to subcontractors who relied on Timber Land to pay them for the work they contributed to jobs.

Nest Builders likewise failed to pay a subcontractor—Westonka—who then obtained a judgment against Nest Builders. Although Allar believed Westonka's claims were excessive, he did not attempt to work out terms of payment until after Westonka had filed a complaint with the Department and followed up with legal action. As of the date of the hearing, the judgment had not been satisfied.

Allowing the license of the most serious violator—Timber Land—to lapse is no way out for Allar or Nest Builders. Allar is the qualifying person for two businesses that have accumulated significant debt over the past several years while he was the qualifying person over both. The Commissioner thus has clear grounds to discipline both entities.

### ***Failing to Use Payment Proceeds to Pay Subcontractors***

In its Second Amended Statement of Charges, the Department asserted that the Respondents, by failing to pay Westonka, violated Minn. Stat. § 326.91, subd. 1(8). That subparagraph sets forth, as a basis for disciplinary action, a licensee's failure to use payment proceeds on a job to pay subcontractors. The ALJ has ruled against the Department on this issue because there was no evidence that either Timber Land or Nest Builders received payment for the jobs on which Westonka worked and for which it was not paid. Proof of payment is an element of the violation. Since no evidence of payment was offered, the Department's claims based on subparagraph eight fail.

### ***Failure to Respond to the Department***

Minn. Stat. § 45.027, subd. 1a requires licensees to comply with Department requests for information, including documents. When the Department notified Respondents of Westonka's complaint, Respondents failed to provide written responses for over three months. Although Allar was ill in December, when LeCuyer sent the information request, no explanation was

given for why responses were not provided in January, February or March. Allar clearly did not attend to the important issue of a complaint against Timber Land and Nest Builders having been filed with the Department.<sup>19</sup> A licensee cannot ignore the Department's investigation of an alleged violation. Failure to submit timely responses is a further ground for disciplinary action against the Respondents.

### ***The Public Interest***

The Commissioner is responsible to insure the public's protection from unscrupulous, incompetent residential contractors. Certainly the Commissioner sees cases where contractors have bilked homeowners of thousands of dollars for work performed shoddily or not at all. The importance of protecting the public from such dishonest or inept residential construction contractors cannot be ignored.

However, the present case does not fit the typical pattern of dishonesty or incompetence. The major problem relates to Timber Land's misjudgments about the potential of the Golden Valley project. The one significant judgment against Timber Land relates to the collapse of that project nearly five years ago. Smaller judgments accrued after that project.

It was apparent at hearing that Allar, the qualifying person for Timber Land and Nest Builders, is a person of integrity. Allar exercised great care over the Golden Valley property to ensure it would bring the highest possible price in foreclosure.<sup>20</sup> Allar testified credibly about becoming discouraged, but not giving up when the Golden Valley project fell through. While he could have filed bankruptcy, he did not. Allar continues to make monthly payments on the bank loan related to the largest of the Timber Land judgments.<sup>21</sup> Allar has repaid most of the subcontractors as well.<sup>22</sup> It is both commendable and remarkable that Allar chose to pursue the responsible path of making good on Timber Land's miscalculation.

It was equally apparent at hearing that Allar is highly competent as a builder. His clients, his vendors, and even one of his long-time subcontractors have attested to the high quality of his work.<sup>23</sup> Allar was recently asked to work

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<sup>19</sup> While the Department's requests for responses were pending, Allar was dealing directly with Westonka to resolve their payment disputes. It appeared that Allar believed he could resolve the Department's concerns in this manner. This, of course, is not true, and does not excuse the failure to respond directly to the Department. However, it may explain, in part, the reason for Allar's delay in responding to the Department.

<sup>20</sup> Ex. 8.

<sup>21</sup> Ex. 8; Test. of L. Allar.

<sup>22</sup> Test. of L. Allar.

<sup>23</sup> Ex. 8.

on state building code standards regarding energy conservation.<sup>24</sup> He continually tries to learn better construction techniques.<sup>25</sup>

In determining what discipline to impose, the Commissioner should weigh against the existence of the Timber Land judgments and Allar's delay in responding to the Westonka complaint,<sup>26</sup> the positive evidence for Nest Builders. In addition, the Victoria town home project may enter into the equation. Nest Builders is currently engaged on that 1.8 million dollar project. Undoubtedly, many subcontractors and vendors, as well as at least one financial institution, are counting on the completion of this project. These are all affirmative points for Allar and Nest Builders which may weigh in favor of discipline short of license suspension or revocation.

### **L. F. C.**

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<sup>24</sup> Test. of L. Allar.

<sup>25</sup> Ex. 8; Test. of L. Allar.

<sup>26</sup> While the Department's requests for responses were pending, Allar was dealing directly with Westonka to resolve their payment disputes. It appeared that Allar believed he could resolve the Department's concerns in this manner. This, of course, is not true, and does not excuse the failure to respond directly to the Department. However, it may explain, in part, the reason for Allar's delay in responding to the Department.