

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Administrative Penalty Order Issued to Charles Corrin	<b>RECOMMENDATION AND ORDER REGARDING DEPARTMENT'S MOTION FOR SUMMARY DISPOSITION</b>
--	---

This matter is pending before Administrative Law Judge Barbara L. Neilson on the Department of Labor and Industry's Motion for Summary Disposition. Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Alan B. Fish, Attorney at Law, 102 2<sup>nd</sup> Avenue N.W., Roseau, MN 56715, appeared on behalf of the Respondent, Charles Corrin.

Based on all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION AND ORDER**

**IT IS RECOMMENDED** that:

The Department's Motion for Summary Disposition be **GRANTED** as to Citations 4 to 8.

**IT IS ORDERED** that:

1. The Department's Motion for Summary Disposition be **DENIED** as to Citations 2-3 and 10-12.

2. Because the Department acknowledges that Citations 1 and 9 are no longer at issue, they shall be deemed to be withdrawn.

3. Due to a conflict in the schedule of the Administrative Law Judge, the telephone conference previously scheduled in this matter for December 19, 2006, shall be rescheduled for **Friday, January 5, 2007, at 1:30 p.m.** The Administrative Law Judge will initiate the conference call.

Dated: December 11, 2006

s/Barbara L. Neilson

---

BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

This contested case proceeding was initiated based upon the Respondent's appeal of an Administrative Penalty Order issued by the Department of Health alleging that he committed certain violations of the Minnesota Plumbing Code set forth in Minnesota Rules Chapter 4715 in connection with the plumbing work he performed at a residence in International Falls, Minnesota. The responsibilities for enforcement of the State Plumbing Code were transferred by Executive Order of the Governor to the Department of Labor and Industry ("DOLI" or "the Department") in May of 2005, and the Plumbing and Engineering Unit of the Department of Health became part of the Department of Labor and Industry. Local ordinances may provide local jurisdictions with enforcement authority as well.

The Department has filed a motion seeking the entry of summary disposition against the Respondent with respect to several alleged violations of the Plumbing Code and requests that the Respondent be ordered to take the corrective actions set forth by the Department in its Administrative Penalty Order. If the Respondent makes the corrections within sixty days of the order of the Administrative Law Judge, the Department urges that the \$5,000 penalty be forgiven; otherwise, the Department asserts that the penalty should be imposed. Respondent filed a memorandum in opposition to the motion. Both parties submitted transcripts of Respondent's deposition and the Department also provided an affidavit of Brad Jensen, who is employed as a Plumbing Inspector with the Department, and a copy of the Administrative Penalty Order.

### Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.<sup>1</sup> Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party is entitled to judgment as a matter of law.<sup>2</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>3</sup>

When considering a motion for summary disposition, the decision maker must view the facts in the light most favorable to the non-moving party.<sup>4</sup> The Department, as the moving party in the current case, has the initial burden of

---

<sup>1</sup> *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500(K).

<sup>2</sup> *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

<sup>3</sup> *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>4</sup> *Ostendorf v. Kenyon*, 347 N.W. 834 (Minn. Ct. App. 1984), *Carlisle v. City of Minneapolis*, 437 N.W. 2d 712, 715 (Minn. Ct. App. 1988).

showing the absence of a genuine issue concerning any material fact.<sup>5</sup> To successfully resist a motion for summary judgment, the non-moving party must show by substantial evidence that there are specific facts in dispute that have a bearing on the outcome of the case. The nonmoving party cannot rely upon general statements or allegations but must show the existence of specific material facts which create a genuine issue.<sup>6</sup> When considering a motion for summary judgment, the Administrative Law Judge must view the facts in the light most favorable to the non-moving party. All doubts and factual inferences must be resolved against the moving party. If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>7</sup>

## **Factual Background**

This summary of the facts in this matter is derived from the submissions of the parties solely for the purpose of resolving the Department's motion. The inferences from the facts have been drawn consistent with the standards for summary disposition. As such, the recitation below does not constitute the final factual determination in this matter.

Respondent is a Master Plumber who is licensed through the State of Minnesota. He began as an Apprentice in 1973, and became a Journeyman Plumber in 1977 and a Master Plumber in approximately 1981.<sup>8</sup> In 2003, Respondent bid on the plumbing work to be performed at a new residential home to be constructed at 106 Fern Wood Lane, International Falls, Minnesota. The general contractor on that construction was Rick Debenedet. Mr. Debenedet had been employed as a city inspector in the past but he was not acting in that capacity with respect to the Fern Wood Lane project.<sup>9</sup> A permit for the work, including the plumbing, was obtained through the City of International Falls ("the City").<sup>10</sup> Under local ordinance, the City has adopted and administers the Minnesota Plumbing Code for plumbing that takes place within the city limits. The local building inspector for the City was Martin Ostrowski.<sup>11</sup>

In the course of plumbing the Fern Wood Lane project, Respondent used PVC piping. Under the Code, "[s]olvent weld joints in PVC and CPVC pipe must include use of a primer of contrasting color to the pipe."<sup>12</sup> Respondent used a clear primer on the joints of his PVC piping in the Fern Wood Lane project. A local building inspector had spoken to Respondent about such work once before in Minnesota (in 1991), and in the course of approving work done with clear

---

<sup>5</sup> *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

<sup>6</sup> *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (Minn. 1976).

<sup>7</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. App. 1985).

<sup>8</sup> Corrin Deposition at 6-9.

<sup>9</sup> Corrin Deposition at 33-34.

<sup>10</sup> Corrin Deposition, Attachment 12 (photocopy of building permit).

<sup>11</sup> Corrin Deposition at 19.

<sup>12</sup> Minn. R. 4715.0810, subp. 2.

primer told Respondent at that time that he preferred that purple primer be used because it could easily be seen.<sup>13</sup> The Respondent testified during his deposition that the primer used by Respondent on the Fern Wood Lane project is approved for use with PVC piping and appropriately prepares the surface of the PVC piping for making tight solvent weld connections. The only difference between the two primers is the color.<sup>14</sup>

After completing the plumbing work, Respondent conducted an air test on August 18, 2003. The air test consisted of capping the openings to the plumbing with the system dry and increasing the air pressure. If the air pressure does not drop after 15 minutes, the system has been shown to be leak-free. The plumbing in the Fern Wood Lane project maintained its air pressure throughout the test.<sup>15</sup> Mr. Ostrowski was present for the air test and he signed off on the sheetrocking of the project after that test.<sup>16</sup>

Respondent also installed a backwater valve on the main sewage line branch for the entire home. He laid out the device to prevent backflows throughout the house. The Code requires that backwater valves only be installed on separate branch drains serving the fixtures below the elevation of the curb or property line.<sup>17</sup> Respondent followed the same approach that Mr. Debenedet had approved when he was acting as the inspector on prior construction jobs, including a project at the home of Mr. Debenedet's parents.<sup>18</sup>

When his work on the underground plumbing was completed, the Respondent left Mr. Ostrowski several messages (including one written note left on Mr. Ostrowski's desk) notifying him that he needed the underground plumbing inspected.<sup>19</sup> Mr. Debenedet told Respondent that, after a certain number of hours, they had permission to cover up the work without a final inspection.<sup>20</sup> Due to delays in the availability of the concrete, the Respondent's work was left uncovered for approximately 1½ weeks before Mr. Debenedet authorized other contractors working on the project to pour the concrete that covered the plumbing work.<sup>21</sup> Mr. Ostrowski was present on the project site between three and five times before the underground plumbing work was covered. Respondent assumed that Mr. Ostrowski had inspected the plumbing work, since he had been on the project site while the work was uncovered.<sup>22</sup> Under the terms of the permit, the installation of sheetrock and cabinetry could proceed to cover the plumbing work once the rough-in sign off was completed.<sup>23</sup>

---

<sup>13</sup> Corrin Deposition at 28-29.

<sup>14</sup> Corrin Deposition at 28-29, 45-46.

<sup>15</sup> Corrin Deposition at 24, 46-47, 56-57.

<sup>16</sup> Corrin Deposition at 24, and Attachment 12 (photocopy of building permit).

<sup>17</sup> Minn. R. 4715.1160.

<sup>18</sup> Corrin Deposition at 58.

<sup>19</sup> Corrin Deposition at 16-17, 50-51.

<sup>20</sup> Corrin Deposition at 31-33.

<sup>21</sup> Corrin Deposition at 51-52.

<sup>22</sup> Corrin Deposition at 32 and 40.

<sup>23</sup> Corrin Deposition at 40; Attachment 12 (photocopy of building permit).

Mr. Ostrowski never signed off on the underground plumbing. The Respondent testified that he did not receive any correction notices from Mr. Ostrowski and Mr. Ostrowski did not otherwise contact him about alleged deficiencies in that plumbing.<sup>24</sup> Respondent also testified that Mr. Ostrowski did not mention any problems with the primer used by Respondent on the PVC piping before signing off on the above-ground plumbing.<sup>25</sup>

For reasons not adequately explained in the submissions of the parties with respect to this motion, disputes arose between the local building inspector and the contractors on the job. During the summer of 2004, approximately one year after the plumbing work had been performed, Mr. Ostrowski requested that Brad Jensen, a DOLI plumbing inspector, conduct a plumbing inspection at the Fern Wood Lane home. Mr. Jensen conducted an inspection on July 13, 2004, accompanied by Mr. Ostrowski, Respondent, and the owner. During the inspection, Mr. Jensen asked what kind of primer was used and Respondent told him he had used clear primer. Mr. Jensen told Respondent that he should have used purple primer on the fittings.<sup>26</sup> Respondent offered to conduct a manometer test<sup>27</sup> and Mr. Jensen declined to have that test performed. Regarding the sewage backflow preventer, Mr. Jensen told Respondent that another state building official had also believed the installed configuration was superior to that in the Code, but that Mr. Jensen had proven that inspector wrong. Mr. Jensen did not explain how the existing installation at the Fern Wood Lane home was inferior to the installation called for in the Code.<sup>28</sup>

At some point prior to July 19, 2004, a Temporary Certificate of Occupancy was issued and the Fern Wood Lane home was occupied by the owners.<sup>29</sup> The owners have not told Respondent of any problems with the functioning of the plumbing in their residence.<sup>30</sup>

There is no evidence the City made any written request for the Department to assume responsibility for the plumbing aspects of the Fern Wood Lane project prior to the Department's inspection on July 13, 2004. However, on July 19, 2004, shortly after Mr. Jensen conducted the inspection, Mr. Ostrowski requested by letter that the Department of Health take over enforcement of the plumbing code at the project.<sup>31</sup> Mr. Ostrowski indicated in the letter that Respondent was "unreasonable, uncooperative, and unresponsive" and lacked "knowledge and competency." Mr. Ostrowski stated that he was "releasing and giving all authority on all the plumbing in this new home to the Minnesota

---

<sup>24</sup> Corrin Deposition at 30.

<sup>25</sup> Corrin Deposition at 40.

<sup>26</sup> Corrin Deposition at 27-28.

<sup>27</sup> A manometer test is similar to an air test, only the system has water in the traps. Corrin Deposition at 47-49.

<sup>28</sup> Corrin Deposition at 58.

<sup>29</sup> Jensen Affidavit, Ex. A; Corrin Deposition at 42 and Exhibit 3.

<sup>30</sup> Corrin Deposition at 65.

<sup>31</sup> Corrin Deposition at 37; Affidavit of Brad Jensen, Exhibit A.

Department of Health's Plumbing Unit and you as the State Plumbing Inspector."<sup>32</sup>

As a result of Mr. Jensen's inspection, the Department of Health mailed Respondent a letter dated November 1, 2004, that identified a number of violations of statute and rule and requested a response. The Department of Health followed this letter up on February 3, 2005, by issuing an Administrative Penalty Order relating to the alleged violations. The following alleged violations of the Plumbing Code were cited in the Administrative Penalty Order:

1. Minn. R. 4715.0520L: The installer of PEX tubing and fittings did not verify factory training.
2. Minn. R. 4715.0810, subp. 2: There was no evidence of the use of primer on the PVC pipe and fittings prior to joining.
3. Minn. R. 4715.1160: The backwater valve was installed on the main branch for the entire home, rather than on a separate branch drain serving the fixtures below the elevation of the curb or property line as required by the rule.
4. Minn. R. 4715.1940: There was no backflow preventer located at the boiler to protect the domestic water.
5. Minn. R. 4715.2410: Sanitary tees were used where the direction of water flow was from the vertical to the horizontal, which is prohibited by the Plumbing Code. The Plumbing Code allows sanitary tees only where the direction of the water flow is from the horizontal to the vertical.
6. Minn. R. 4715.2420, subp. 3: Double wye fittings were used in the horizontal position.
7. Minn. R. 4715.2540: The toilet on the main floor was vented horizontally below the flood level of the rim.
8. Minn. R. 4715.2655: The kitchen sink island vent was not installed according to the Plumbing code.
9. Minn. R. 4715.2820, subp. 2: There was no evidence of a rough-in air test performed on the new plumbing system.
10. Minn. R. 4715.2820, subp. 3: There was no evidence of a manometer test after the fixtures were set.
11. Minn. R. 4715.2830: The plumbing had been covered prior to inspection and testing.
12. Minn. R. 4715.2840: The defective plumbing was not replaced when notice was given by the initial administrative authority in this matter, the City of International Falls.<sup>33</sup>

---

<sup>32</sup> Affidavit of Brad Jensen, Exhibit A.

<sup>33</sup> Affidavit of Brad Jensen, Exhibit B.

The Administrative Penalty Order imposed a \$5,000 fine which was entirely forgivable if the listed corrections were made within 30 days. The corrections identified in the Order were as follows:

1. Verify factory training for the installer of PEX tubing and fittings, in full accordance with the requirements of Minnesota Rules, part 4715.0520L.
2. Remove all PVC pipe and fittings for which contrasting primer was not used when joining. Use primer on the PVC pipe and fittings prior to joining, in full accordance with the requirements of Minnesota Rules, part 4715.0810, subp. 2.
3. Remove the backwater valve installed on the drainage piping serving the entire building. Install a backwater valve only on the drainage piping serving the fixtures below the elevation of the curb or property line, in full accordance with the requirements of Minnesota Rules, part 4715.1160.
4. Install a backflow preventer at the boiler to protect the domestic water, in full accordance with the requirements of Minnesota Rules, part 4715.1940.
5. Remove sanitary tees used where the direction of flow is from the vertical to the horizontal. Replace with approved fittings or combinations of fittings, in full accordance with the requirements of Minnesota Rules, part 4715.2410.
6. Remove the double wye fittings used in the horizontal position. Replace with fittings which do not retard the flow, in full accordance with the requirements of Minnesota Rules, part 4715.2420, subp. 3.
7. Vent the toilet on the main floor vertically, or at an angle not more than 45 degrees from the vertical, to a point at least six inches above flood-level rim of the fixture, before offsetting horizontally or before connecting to the branch vent, in full accordance with the requirements of Minnesota Rules, 4715.2540, subp. 2.
8. Re-install the kitchen sink island vent, in full accordance with the requirements of Minnesota Rules, part 4715.2655.
9. Conduct a rough-in air test on the new plumbing system following correction of deficits, in full accordance with the requirements of Minnesota Rules, part 4715.2820, subp.2.
10. Conduct a manometer test after the fixtures are set, in full accordance with the requirements of Minnesota Rules, part 4715.2820, subp. 3.

11. Uncover or otherwise make available for inspection the entire plumbing system, in full accordance with the requirements of Minnesota Rules, part 4715.2830.
12. Replace or repair the defective plumbing, as indicated above, in full accordance with the requirements of Minnesota Rules, part 4715.2840.<sup>34</sup>

The Order also noted the right to appeal the terms of the Order to the Office of Administrative Hearings.<sup>35</sup> Respondent appealed the Order. On December 2, 2005, the Department issued the Notice of and Order for Prehearing Conference setting this matter on for a contested case hearing. The parties are also involved in separate litigation in district court involving the project.

## **Discussion**

### **Citations 1 and 9**

Because Respondent has provided verification that he is factory-trained in the installation of PEX piping, the Department has agreed that Citation 1 is no longer at issue.<sup>36</sup> The Department has also acknowledged that Citation 9 is no longer at issue because Respondent has testified that he did perform a rough-in air test on the existing plumbing system at the time of the City's rough-in inspection and before Mr. Jensen inspected the home. The Department contends that another air test should be performed after the defects are corrected, in accordance with the corrective actions it has ordered, and it appears that the Respondent has agreed to perform the retest.<sup>37</sup> Therefore, Citation 9 has also been resolved, subject to the retest after corrections are made. Accordingly, these two citations shall be deemed to have been withdrawn by the Department.

### **Citations 4 - 8**

Respondent was deposed as part of on-going litigation involving the construction of the Fern Wood Lane residence. In his deposition, Respondent acknowledged that his work was not compliant with regard to Citations 4 through 8 and indicated that he had no objection to replacing the work identified in those citations in the manner set out in the Administrative Penalty Order.<sup>38</sup> Accordingly, there are no genuine issues of material fact relating to Citations 4 through 8 and the entry of summary disposition in favor of the Department is appropriate regarding the violations and corrections ordered by the Department.

---

<sup>34</sup> Affidavit of Brad Jensen, Exhibit B.

<sup>35</sup> Affidavit of Brad Jensen, Exhibit B.

<sup>36</sup> Department Memorandum at 3; Corrin Deposition at 55.

<sup>37</sup> Department Memorandum at 5; Corrin Deposition at 64.

<sup>38</sup> Corrin Deposition at 60-64.

### **Citation 10**

Citation 10 alleges that Respondent violated Minn. R. 4715.2820 because there was no evidence of a manometer test being conducted after the fixtures were set. In his deposition, Respondent indicated that he did, in fact, conduct such a test after the completion of his work, and the system passed the test.<sup>39</sup> Therefore, genuine issues of material fact remain for hearing with respect to this citation.

### **Citations 2 - 3 and 11 - 12**

Respondent has established that genuine issues of material fact remain for hearing with respect to the remaining citations. These include Citation 2, which alleges that there was no evidence of the use of primer on the PVC pipe and fittings prior to joining; Citation 3, which alleges that the backwater valve was installed on the main branch for the entire home, not only on the drainage piping serving the fixtures below the elevation of the curb or property line; Citation 11, which alleges that the plumbing “had been covered prior to inspection and testing;” and Citation 12, which alleges that “the defective plumbing was not replaced when notice was given by the initial administrative authority in this matter, the City of International Falls.”

Respondent testified during his deposition that he did, in fact, use a primer on the pipe and fittings. He acknowledged that the primer was clear and thus was not a contrasting color as required by the Code. However, he argued that the plumbing passed the pertinent air test, the air test verifies that the system is working properly even if it is not visually inspected, and replacing the clear primer with purple primer would make no difference in the functioning of the plumbing system.<sup>40</sup> Genuine issues of fact remain concerning whether there was adequate evidence of the use of primer under these circumstances.

With respect to the backwater valve, Respondent (a master plumber) indicated that the method he used is better than the method set forth in the Code and noted that Mr. Debenedet (a former local building inspector) and at least one former state inspector (according to a comment made by Mr. Jensen during his inspection that Respondent reported during his deposition) agreed with his approach.<sup>41</sup> The Respondent has demonstrated that there are genuine issues of material fact regarding whether his approach simply exceeded the standards set in the code and, if so, whether his work should be deemed to be in violation of the code.

Questions of fact also preclude the entry of summary disposition with respect to Citation 11, which alleges that the plumbing was covered prior to inspection and testing. The Respondent testified during his deposition that he conducted pertinent tests, the above ground plumbing passed those tests, and Mr. Ostrowski in fact approved that plumbing. The plumbing permit shows that

---

<sup>39</sup> Corrin Deposition at 64-65.

<sup>40</sup> Corrin Deposition at 56-57.

<sup>41</sup> Corrin Deposition at 58-60.

Mr. Ostrowski did, in fact, sign off on the building permit with respect to the rough-in above ground plumbing. There is no dispute that the covering of the above-ground plumbing work did not occur until after Mr. Ostrowski signed off on that portion of the job. If any question regarding the proper color of the primer used by Respondent was to be raised, it is reasonable to assume that that should have occurred before Mr. Ostrowski signed off on the work. Therefore, genuine issues of material fact have been shown with respect to whether the above ground plumbing was covered prior to inspection and testing.

The parties agree that Mr. Ostrowski never signed off with respect to the underground portion of the plumbing work. Respondent testified during his deposition that he made multiple attempts to notify Mr. Ostrowski that the underground plumbing work was ready for inspection. He also asserted that Mr. Ostrowski was present at the construction site on several occasions during the 1½ weeks that the work remained uncovered and available for inspection. The Department did not provide any evidence disputing this testimony.

The plumbing code includes specific provisions regarding notification of local building officials prior to conducting inspections. The code states:

It shall be the duty of the plumbing contractor to notify the proper administrative authority and the owner or the owner's authorized agent orally, by telephone, or in writing, not less than eight working hours between the hours of 8:00 a.m. and 4:00 p.m. before the work is to be inspected or tested. It shall be the duty of the plumbing contractor to make sure that the work will stand the test prescribed before giving the above notification. If the proper administrative authority finds that the work will not stand the test, the plumbing contractor shall be required to renotify as above. *If the proper administrative authority does not appear for an inspection within 24 hours of the time set, excluding Saturdays, Sundays, and holidays, the inspection or test shall be deemed to have been made*, and the plumbing contractor is required to file an affidavit with the proper administrative authority that the work was installed in accordance with the code, the approved plans and permit, and that it was free from defects and that the required tests had been made and the system found free from leaks; also whether the owner or the owner's authorized agent was present when such inspection or test was made.<sup>42</sup>

The language of this rule (hereinafter referred to as the “notification rule”) is consistent with the description of the proper process for initiating local building official inspections given by Mr. Debenedet (who was himself a former local building inspector). Under the terms of the notification rule, Respondent need only certify that the work is done in accordance with the plumbing code and it is deemed inspected. Since the period of notice ran long before Mr. Jensen was called in, it appears that the July 13, 2004, inspection would not supersede the

---

<sup>42</sup> Minn. Rule 4715.2810 (emphasis added).

inspection deemed completed under the notification rule. Based upon Respondent's deposition testimony and in light of the notification rule, genuine issues of fact thus remain for hearing regarding whether the Respondent provided appropriate notifications regarding the readiness of the underground plumbing for inspection, and whether Respondent's method of installation of the underground plumbing thus should be deemed to have been approved, absent a showing of a defect.

Citation 12 alleges that Respondent violated Minn. R. 4715.2840 when "defective plumbing was not replaced when notice was given by the initial administrative authority in this matter, the City of International Falls."<sup>43</sup> As discussed above, Respondent has agreed to correct the plumbing involved in Citations 4 to 8. Therefore, there is no genuine issue of fact regarding requiring the corresponding corrections for those citations.

The only two items contested by the Respondent are the use of primer of a noncontrasting color and the installation of the sewage backflow preventer on the main sewage line. There is no evidence in the record of this motion that the local building inspector gave notice to the Respondent of any problem with either of these two items which are now claimed to be defective. To the contrary, Respondent testified during his deposition that he did not receive any indication from the local building inspector that any of the work being cited in the Order needed to be replaced before that work was covered.<sup>44</sup> Accordingly, genuine issues of material fact remain for hearing regarding this citation.

In addition, there are genuine issues of material fact involving whether or not these portions of Respondent's work are, in fact, "defective" so as to warrant replacement. The rule authorizing the Department to require replacement states:

If the inspection or test shows defects, such defective work or material shall be replaced and the inspection and test repeated.

All installed fixtures found defective or in an insanitary condition shall be repaired, replaced, or removed upon written notice from the proper administrative authorities.<sup>45</sup>

The term "defective" is not defined in the Code. As used in the replacement rule, the term appears to mean work that: 1) fails an appropriate test; 2) does not function; or 3) results in an unsafe condition. The replacement rule does not, on its face, require replacement solely for failure to completely comply with the Code.<sup>46</sup>

The purpose of the State Building Code, including the Plumbing Code, is set out in Minn. Stat. § 16B.59, which states:

---

<sup>43</sup> Affidavit of Brad Jensen, Exhibit B.

<sup>44</sup> Corrin Deposition at 40.

<sup>45</sup> Minn. R. 4715.2840.

<sup>46</sup> It is noted that the notification rule draws a distinction between work complying with the Code and work that is free from defects. Minn. Rule 4715.2810.

The State Building Code governs the construction, reconstruction, alteration, and repair of buildings and other structures to which the code is applicable. The commissioner shall administer and amend a state code of building construction which will provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs. The construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.

As noted above, Respondent contends that his backwater valve configuration is actually superior to that required by the code. In addition, Respondent argues that there are no problems with the current plumbing system and the clear primer he used functions just as well as the purple primer Mr. Jensen prefers. While not fully discussed by either party, it appears that replacement of the solvent welds would require the removal of floors, fixtures, walls, cabinetry, carpeting, and concrete flooring, and thereby require significant demolition of the new house. If the sole purpose to be achieved by the correction ordered by the Department is to change the color of the primer used in making those welds, the approach may be contrary to the statutory requirement that the Code permit construction "at the least possible cost consistent with recognized standards of health and safety." There may also be adverse impacts on the owners, who will have their new home, in essence, subjected to the equivalent of a complete remodeling to change the color of primer used in plumbing which apparently functioned properly.

Accordingly, issues of fact remain regarding whether the backwater valve work and solvent weld work performed by Respondent is defective or inconsistent with recognized standards of health and safety so as to warrant replacement.

### **Summary**

The Department agrees that the matters raised in Citations 1 and 9 are no longer at issue in this case, and those citations shall be deemed withdrawn.

There are no genuine issues of material fact regarding Citations 4 through 8. The Respondent has acknowledged that the work identified in those citations should be corrected as indicated in the Order and that he is willing to make those corrections. Accordingly, the Administrative Law Judge recommends that the Department be granted summary disposition as to those citations.

The Respondent has established that genuine issues of material fact remain for hearing with respect to Citation 2 (purple primer issue), Citation 3 (backwater valve issue), Citation 10 (manometer test issue), Citation 11 (plumbing covered prior to inspection), and Citation 12 (replacement of defective plumbing). Accordingly, summary disposition is denied with respect to those issues and those citations will proceed to hearing. At the conclusion of the

contested case proceeding, the Administrative Law Judge's summary judgment recommendation along with her recommendation with respect to the remainder of the citations will be forwarded to the Commissioner to make the final administrative determination.

**B. L. N.**