

**BEFORE THE WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS**

IN RE: STEPHEN G. CAPELLI

C2009-11

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers by Edward L. Robinson, P.E., its president (hereinafter "the Board") for the purpose of agreeing to disciplinary action to be taken against Stephen G. Capelli (hereinafter "Respondent"). As reflected in this document, the parties have reached an agreement concerning the proper disposition of this matter, and the Board, upon approval of such agreement, does hereby **FIND** the following:

1. The Board is a state entity created by West Virginia Code § 30-13-1 *et seq.* and is empowered to regulate the practice of professional engineering pursuant to the same.
2. Ed Roscioli of ChemBioShelter, Inc, submitted a third-party complaint against Stephen G. Capelli ("Respondent") on February 5, 2009, which was received by the Board on February 17, 2009, and filed on February 24, 2009.
3. Respondent holds WV PE license number 07672 and his address of record is in Daniels, Raleigh County, West Virginia.
4. This Complaint relates to Mr. Capelli's initial certification of an application for an underground mine refuge shelter submitted by A.L. Lee Corporation dated November 19, 2008.
5. The Complaint alleges that Respondent performed a sub-standard certification of an application for the shelter and that this lack of thorough evaluation could prove hazardous to the lives of miners.
6. The sum and substance of other allegations in the Complaint are that Respondent spent an insufficient amount of time reviewing the application prior to applying his professional engineer's seal and did not have the experience and expertise to certify same.

7. The Complaint further alleges that A.L. Lee Corporation indemnified Respondent, after which Respondent could no longer be considered an independent West Virginia licensed professional engineer as required by West Virginia law regulating underground mine rescue chambers [Emergency Shelters/Chambers, W. Va. Code R § 56- 4-8.

8. West Virginia law relating to the application for approval of underground mine rescue chambers, including an engineer's certification thereof, is enforced by the Office of Miners' Health, Safety and Training.

9. However, the Board finds that the engineer's certification of mine refuge chambers and shelters is a matter that also concerns this Board, which has a duty to safeguard life, health and property and to promote public welfare by regulating the practice of engineering in the public interest.

10. Respondent, through counsel, timely filed a response to the Complaint, categorically denying the allegations of the Complaint.

11. Matters relating to the sum and substance of this Complaint are the subject of a related civil action brought by ChemBioShelter, Inc., against A.L. Lee Corporation, which action is still pending.

12. Based on representations of counsel for Respondent and the Board's independent investigation, the Office of Miners' Health, Safety and Training was aware of the indemnification, reviewed the facts and circumstances regarding same, and approved A.L. Lee's application notwithstanding the indemnification agreement.

13. The Board finds that allegations regarding the indemnification agreement, under the facts and circumstances presumed to be true, do not constitute a violation of West Virginia engineering law since the indemnification was a result of the civil action and occurred after Respondent's initial certification of the application.

14. Respondent admits that he relied on the work of other engineers and spent an insufficient amount of time personally reviewing or checking the submittal application prior to his initial certification of same, resulting in his not having an adequate knowledge of the mine rescue chamber and not making a thorough evaluation of the matters included in the application.

15. Respondent states that the insufficient time was based on the fact, as clearly stated in the initial certification, that A. L. Lee had shipped over 100 units of the rescue chamber into the coal fields and that the submittal application was “basically a resubmittal of a West Virginia approved and proven system under a new name.”

16. The Board finds that the insufficient time spent on the initial certification of the application is prima facie evidence of a violation of Section 12.3(e) of this Board’s Code of Professional Responsibility for Professional Engineers which, as an obligation to society, requires a registrant to express a professional opinion publicly only when it is founded on an adequate knowledge of the facts and a competent evaluation of the subject matter.

17. The Board notes that the application for mine refuge shelter at issue in this Complaint was approved by the agency with jurisdiction over same and makes no finding with regard to the suitability of the product for its intended purpose or whether Respondent’s initial certification of same was of a character likely to harm the public.

18. The Board has no evidence of harm to the public and makes no finding regarding same, and the Board’s findings do not extend to the later certification but are limited to the initial certification at issue here.

19. The Board finds that the certification of a mine refuge chamber without adequate knowledge of the facts and a competent evaluation of the subject matter has the potential to impact life, health and property which this Board has a duty to protect.

20. The Board finds that the certification of a mine refuge chamber is a public expression of a professional engineer’s opinion, and the Board’s Rules of Professional Responsibility require

such opinions to be founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter.

21. The Board finds that Respondent's initial certification of a mine refuge chamber without adequate knowledge of the facts and a competent evaluation of the subject matter is a violation of its Rules of Professional Responsibility.

22. The Board finds that Respondent's violation of its Rules of Professional Responsibility warrants public reprimand and that, because the violation has the potential to impact life, health and property, the maximum civil penalty for violation of these rules is warranted.

23. The Board has incurred administrative costs in excess of \$2,500.00.

CONCLUSIONS OF LAW

24. In order to safeguard life, health and property and to promote the public welfare, the Board has the power and duty to regulate the practice of engineering in the public interest. W. Va. Code § 30-13-2.

25. It is unlawful for a professional engineer to sign or affix the professional engineer's seal on any document which has not been prepared or completely checked by the professional engineer or under his direct supervision or control. W. Va. Code § 30-13-21(a)(10).

26. Registrants shall express a professional opinion publicly only when it is founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter. W. Va. Code R § 7-1-12.3(e).

27. The Board is authorized to Assess civil penalties against any person who violates any provision of this article or any rule promulgated by the board for each offense in an amount determined by the board." W. Va. Code § 30-13-21(b); *see also* W. Va. Code § 30-13-21(d)(4).

28. For each violation of applicable statutes and rules, including the Rules of Professional Responsibility, the Board may impose a civil penalty not to exceed five thousand dollars (\$5000.00) per offense. W. Va. Code R § 7-1-15.1.

CONSENT OF RESPONDENT

Stephen G. Capelli, by affixing his signature heron, agrees to the following:

29. Respondent, by counsel, is aware of his option to pursue this matter through appropriate administrative and/or court procedures, but Respondent intelligently and voluntarily waives his right to do so, in the event that this Consent Order is approved by the Board.

30. Respondent intelligently and voluntarily waives his right to a formal hearing before the Board in this matter provided the Board accepts the terms and conditions set forth herein.

31. Respondent admits that he relied on the work of other engineers and spent an insufficient amount of time personally reviewing or checking the submittal application prior to his initial certification of same, resulting in his not having an adequate knowledge of the mine rescue chamber and not making a thorough evaluation of the matters included in the application.

32. Respondent consents to the entry of this Consent Order freely and voluntarily and not under duress, restraint or compulsion.

33. Respondent acknowledges that entering into the negotiation of this Consent Order constitutes a waiver of any and all objections regarding the timeliness of Board action on Complaint Number C2009-11. This paragraph is binding on the participants even in the event that the Board does not approve this Consent Order.

34. Respondent acknowledges that this Consent Order is being executed for the purpose of avoiding further administrative action with respect to the above-styled matter. In this regard, Respondents authorize the Board to review and examine all investigative file materials concerning the Complaint prior to or in conjunction with consideration of this Consent Order.

35. Should the Board not approve this Consent Order, Respondent has waived any objections to the Board or any of its members participating in the adjudication of this matter. This paragraph is binding on the participants even if the Board does not approve this Consent Order.

36. Respondent acknowledges that the Board may reject this proposal, complete the hearing, and, upon adjudication, impose such sanctions of a disciplinary nature as it deems appropriate.

37. Respondent acknowledges that, upon acceptance by the Board, this Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to same may be the subject of any appeal or other civil or administrative action between the parties except an action to enforce the terms of this Consent Order.

38. Respondent understands that this Consent Order and the underlying Complaint are public records and agrees that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).

39. Respondent acknowledges that proof of any misstatement or misrepresentation made in connection with this matter will result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation of any certification issued to Respondent by the Board, and the addition of any other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

ORDER

1. On the basis of the foregoing, and upon entry of this Consent Order, the Board hereby **ORDERS** that this Consent Order shall serve as settlement of Complaint number C2009-11 pursuant to West Virginia Code § 30-13-22(b).

2. The Board **ORDERS** that Respondent be reprimanded for practicing engineering in a manner that fails to meet his obligation to society under this Board's Rules of Professional Responsibility.

3. The Board **ORDERS** Respondent to pay a civil penalty in the maximum amount of \$5,000.00 for violating West Virginia Code R § 7-1-12.3(c)].

4. The Board **ORDERS** Respondent to successfully complete within one year from the date of entry of this Order the Basic Studies in Engineering Ethics offered by Murdough Center for Engineering Professionalism at Texas Tech University, Lubbock, Texas.

5. The Board **ORDERS** Respondent to pay administration costs in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

6. The civil penalty imposed herein totaling Five Thousand Dollars (\$5,000.00) must be paid within thirty (30) days of the date Respondent receives notice of the Board President's signature hereon, such amount to be made payable to the W. Va. P.E. Board for transfer to the general fund of the State of West Virginia upon receipt.

7. The administrative costs imposed herein must be paid within thirty (30) days of the date of the signature of the Board President, such amount to be made payable to the W. Va. P.E. Board for transfer into the funds of the W. Va. P.E. Board.

8. Failure to remit the payment of the civil penalty or administrative costs imposed herein within the prescribed time period may result in further disciplinary action.

9. Respondent shall not practice or offer to practice engineering in the State of West Virginia, as defined by W. Va. Code § 30-13-1 *et seq*, except as in accordance with West Virginia engineering law as set forth in W. Va. Code § 30-13-1 *et seq*, the rules promulgated by the Board, and the limitations and requirements set forth in this Consent Order, including the prohibition against practicing outside the area of one's education, experience and expertise.

10. In accordance with the laws and rules governing the Board, this Consent Order and the underlying Complaint are public records and the sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange

database administered by the National Council of Examiners for Engineering and Surveying (NCEES).

11. Any violation of the terms of this Consent Order shall be immediate cause for further disciplinary action by the Board.

12. If the civil penalties and administrative costs imposed herein are not timely paid, this Consent Order may be summarily enforced in the Circuit Court of Kanawha County without further notice to Respondents upon application by the Board for the entry of a Judgment Order for the total amount of outstanding balance of the amount agreed to herein (\$7,500.00), together with pre-judgment interest from the date of the President's signature hereon, post-judgment interest from the date of entry of the Judgment Order and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.

13. This matter shall remain open until such time as there is full compliance with the terms set forth herein.

14. This Consent Order relates solely to matters within the jurisdiction of the West Virginia Board of Registration for Professional Engineers and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

15. Except as to any action by the West Virginia Board of Registration for Professional Engineers, this Consent Order does not constitute any admission by Respondent as to any claim or element of any claim which has or may be asserted by any person or entity in any civil action.

AGREED TO BY:

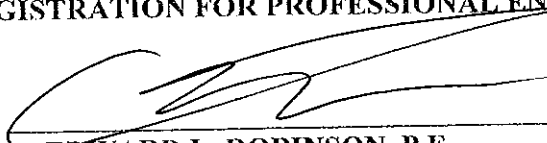

STEPHEN G. CAPELLI

9/15/11
DATE

ENTERED into the records of the West Virginia State Board of Registration for Professional Engineers this 20th day of SEPTEMBER, 2011.

WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS

By:


EDWARD L. ROBINSON, P.E.,
BOARD PRESIDENT

PREPARED BY:

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