

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

**In the matter of
Bureau of Commercial Services,
Petitioner**

Docket No. 2001-1594

Agency No. 21-00-6246

**v
David L. Mlynarchek,
Respondent**

Agency: Bureau of Commercial Services

Case type: Sanction

**Issued and entered
this 21st day of June 2002
by Erick Williams
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

In October 2000, Peter and Karen Brown filed a complaint against David Mlynarchek regarding construction defects in their new house in Walker, Michigan. The Bureau of Commercial Services filed a formal complaint against Mr. Mlynarchek in May 2001. The first session of the hearing convened on 29 November 2001. At the November hearing, the parties reached a settlement and the case was dismissed. However, the settlement was not consummated, and a second session of the hearing convened on 29 April 2002. Tracy Hampton represented the Bureau of Commercial Services. David Mlynarchek participated without a lawyer.

ISSUES AND APPLICABLE LAW

Mr. Mlynarchek is accused of violating the following statutes: MCL

39.2411(2)(d) reads as follows:

(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article.

(d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications....

MCL 339.2411(2)(m) reads as follows:

(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article.

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

1979 AC R 338.1551(4) reads:

If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

FINDINGS OF FACT

Peter and Karen Brown contracted with David Mlynarchek for a new house. Mr.

Mlynarchek builds houses; he does all or most of the work himself.

Mr. Mlynarchek started work in June 1999. The closing was in November 1999, and the Browns moved into the house at about that time. At closing, the Browns withheld about \$3750 for what they considered unfinished work.

About two weeks after the closing, the Browns gave Mr. Mlynarchek a list of construction defects. Mlynarchek refused to correct the defects until he received the \$3700 that the Browns had withheld. After some delay, the Browns paid the \$3750 in March 2000, but Mr Mlynarchek did not fix the bulk of the problems on the Browns' list, even after receiving the money. In October 2000, the Browns filed a complaint.

The Browns gave their list of construction defects to the building inspector. Art VenRoy, building inspector for the City of Walker, conducted an inspection in 2001. Tim McGladdery, another Walker inspector, accompanied Mr. VenRoy on the inspection.

Inspection

The discussion below follows the numbering in Mr. VenRoy's inspection report, which in turn was based on the list produced by the Browns. The discussion below summarizes Mr. VenRoy's observations on each item. All the defects cited by Mr. VenRoy are workmanship defects, under MCL 339.2411(2)(m). The discussion below also summarizes any significant testimony by Mr. or Ms Brown or Mr. Mlynarchek on those items, and includes my opinion regarding each item.

All other things being equal, when there was a flat-out conflict between Mr. VenRoy's testimony and Mr. Mlynarchek's regarding an observed condition, I relied on Mr. VenRoy's observation. In my view, Mr. VenRoy's testimony deserves the greater weight since

he is somewhat less biased than Mr. Mlynarchek or the Browns. Mr. VenRoy has no financial interest in the outcome of the case. He did not bring the complaint, so he is not emotionally invested in the outcome. Also, formally, as the building inspector, Mr. VenRoy's "verification" of alleged workmanship defects is required by MCL 339.2411(2)(m).

Item 2

Mr. VenRoy: The french door deadbolt in the kitchen was difficult to move. It was hard to open the door. It needed an adjustment. It is a workmanship problem because they should have adjusted it. The plate did not receive the bolt. It was either too high or too low. A french door should latch.

Williams opinion: The french door did not latch properly because the deadbolt could not properly enter the strike plate.

Item 3

VenRoy: There was a screw missing from the handle of the french door in the kitchen. There was a hole, but no screw in it.

Mlynarchek: A screw was missing. It was stripped. The Browns bought the lock; it was their responsibility.

Williams opinion: Nothing in the specifications [Exhibit 3] indicates that the french door lock is the owner's responsibility. On the contrary, Item 9 reads: "One french door and one vinyl sliding door make Kolbe and Kolbe. Allowance for french door is

\$500." According to Exhibit 3, the french door is the builder's responsibility to install, even though the Browns may have selected the model.

Item 4

VenRoy: The exterior molding of the french door leading to the kitchen had a piece broken or missing at the bottom. There were gaps in the trim.

Mlynarchek: The Browns were responsible for defects in the french door.

Williams opinion: Nothing in the specifications [Exhibit 3] indicates that trim around the french door lock is the owner's responsibility. On the contrary, Item 19 reads: "Trim to be colonial oak with doors to be flush hollow core oak. Wood trim to be stained." According to Exhibit 3, trim is the builder's responsibility.

Item 10

VenRoy: There is a large crack above and below the window in the south wall of the greeting room, where the trim was nailed to the window. The trim was not nailed tightly. There is a gap between the trim and the window casing. Air leaks through. There was no crack; there was a gap behind the trim.

Mr. Brown: The drywall is cracked.

Mlynarchek: There was a drywall crack after Mr. Mlynarchek painted the wall; he repaired it, but it might have come back again.

Williams opinion: Around the south wall window in the gathering room, there is a gap between the trim and the wall, perhaps due to a drywall crack.

Item 17

VenRoy: The wooden ledge in the stairwell has only one coat of finish.

Mlynarchek: The trim has one coat of finish. Someone put a hand print on the wet-varnish, and Mlynarchek refused to fix it.

Williams opinion: The finish on the wooden rail or trim on the stairwell is too thin because Mr. Mlynarchek unilaterally refused to apply a second coat. The workmanship defect is his responsibility.

Item 18

VenRoy: There may be insufficient insulation above the door in the stairwell. Mr. VenRoy did not check the insulation; inspectors do not normally inspect insulation. The homeowners were getting condensation coming through the drywall in the ceiling. There was staining over the door.

Mr. Brown: The area is cold. Mr. Brown has not noticed condensation problems on the ceiling.

Mlynarchek: Mr. Mlynarchek recalls putting insulation above the door.

Williams opinion: There is condensation over the door in the stairwell, as evidenced by staining, which suggests a gap in insulation.

Item 19

VenRoy: The light switches at the top and bottom of the stairwell and the cold air return plate are not flush with the wall. Normally such plates fit tightly.

Mlynarchek: One light switch did come out a little bit.

Williams opinion: The light switch plate at the head of the stairwell and the cold air return are not flush with the wall.

Item 20

VenRoy: The drywall in the stairwell is uneven, unsanded, and has wavy seams. Maybe it did not get sanded. To fix the bad spots of drywall in the stairwell would cost \$300 or \$400.

Mlynarchek: It looked good to Mlynarchek.

Williams opinion: There are rough spots and wavy seams in the drywall.

Item 21

VenRoy: The closet door in the stairwell is warped, needed adjusting, and was not square. The trim was crooked.

Williams opinion: A closet door was warped and out of square.

Item 22

VenRoy: The door to the garage from the stairwell was poorly painted.

Mlynarchek: The door was painted. It was a permanent door.

Williams opinion: The door to the garage was either unpainted or painted poorly.

Item 23

VenRoy: On the trim on outside of the front door there were splatters of

cement.

Mlynarchek: Mr. Mlynarchek usually cleans such splatters; the trim was not splattered.

Williams opinion: There were concrete spatters on the trim around the outside front door.

Items 24 and 26

VenRoy: The cement is rough, spalled and scaling on the steps near the front door, on the sidewalk and in the driveway. Some sections are affected; others not. The affected sections should be replaced.

Mlynarchek: There is a hairline crack. There is spalding. Maybe the homeowners put salt on the driveway. The cement was poured on two different days.

Williams opinion: Certain sections of poured concrete are flawed, while other sections are not flawed, which implies a problem with one of the cement pours, not a salt problem.

Item 27

VenRoy: The bi-fold closet doors in the master bedroom are uneven and should have been adjusted.

Mlynarchek: Usually the carpenters adjust the doors.

Williams opinion: The closet doors are uneven and should have been adjusted.

Item 28

VenRoy: There was a rough spot in the drywall in the master bedroom that did not get sanded out. Some sections were bad, with rough seams. The walls were not sanded before being painted.

Peter Brown: The bad spots were between the closets, near a seam, also on the north wall, where a seam did not get sanded. The problem is visible at certain angles of view.

Mlynarchek: Mr. Mlynarchek sanded the walls.

Williams opinion: The walls had rough spots; perhaps they were insufficiently sanded in some spots.

Item 29

VenRoy: There were spots on the ceiling of the master bedroom that were primed but not given a second coat.

Peter Brown: All the ceilings were painted but not painted well. Spots were missed in various rooms.

Mlynarchek: The ceiling was bad.

Williams opinion: Parts of the ceiling in the master bedroom were inadequately painted.

Item 31

VenRoy: The bathroom door in the basement was hung crookedly. The door did not catch.

Peter Brown: You can see light through the cracks.

Mlynarczek: There was some light visible around the edge of the door.

Williams opinion: The bathroom door in the basement was crooked and did not catch.

Item 32

VenRoy: The door casing trim in the master bedroom was too short; it did not go all the way to the floor. There was a 1/4" gap at the bottom.

Mlynarczek: Mlynarczek did not put it up uneven.

Williams opinion: The door trim was too short.

Item 33

VenRoy: The wall near the shower off the master bedroom was cracked where the drywall meets the shower enclosure.

Brown: A one-foot section of wall was cracked. Brown filled the area with putty and sanded it.

Mlynarczek: Caulked it in July 2001. By then Brown had fixed it.

Williams opinion: The cracked wall near the shower off the master bedroom has been fixed. There is no existing defect. Mr. Brown did not testify how much it cost to fix the problem.

Item 35

VenRoy: VenRoy and Tim McGladdery (the two Walker inspectors) could feel air behind the window trim in the master bedroom. There may be no insulation.

Brown: You can feel a breeze.

Mlynarchek: The windows were all packed with insulation.

Williams opinion: There is air flow around the window trim, indicating either no insulation or a gap in the insulation.

Items 36 and 42

VenRoy: The counter tops are not level in the small bathroom and the downstairs bathroom. They appeared unlevel to the naked eye. Several people looked at it and agreed.

Brown: In the half bath upstairs, the counter top is .25" or .5" off level.

Mlynarchek: The counter top was off by .25". The cabinets were second-hand and of different heights. It is impossible to put shims on the bottom because in a moist bathroom, they will deteriorate.

Williams opinion: The counter top is not level. It is not impossible to shim the cabinets; shims need not be made of wood but some other material not affected by moisture.

Item 37

VenRoy: In the small bathroom, the cabinet door had not been installed; it was there but was not hung yet.

Brown: The cabinet is not finished. There is some wood under the sink; but it is not a cabinet.

Mlynarchek: There was a 45 degree angle wall. Mlynarchek is not a cabinet maker.

Williams opinion: The door to the small bathroom is not finished, and the sink in the small bathroom is not properly trimmed.

Item 38

VenRoy: The door in the small bathroom was hung unevenly. There was a bigger gap between the door and the jamb on one side than the other.

Mlynarchek: Mr. Mlynarchek recalls that he hung the door right.

Williams opinion: The main bathroom door was hung off center.

Item 39

VenRoy: The west wall in the upstairs bedroom was rough. It looked as if the drywall had not been sanded.

Peter Brown: There is also a bulge in the wall.

Mlynarchek: The drywall itself is not uneven. Above that wall is a girder truss; there was a bulge as the wall was built around the girder.

Williams opinion: The wall in the upstairs bedroom was rough and unsanded.

The inspector did not cite the bulge problem.

Item 41

VenRoy: The bi-fold closet doors in the upstairs bedroom were crooked.

Mlynarchek: The doors were probably put up right, but the carpet people got them out of adjustment.

Williams opinion: The closet doors in the upstairs bedroom are crooked. The doors are the builder's responsibility.

Item 43

VenRoy: There were problems (unspecified) with the drywall in the downstairs bedroom.

Mlynarchek: There was a problem with the drywall in various parts of the house.

Williams opinion: There was a problem with the drywall in the downstairs bedroom.

Item 44

VenRoy: In the downstairs bathroom, the trim around the bottom of the tub did not reach all the way to the floor.

Mlynarchek: There is a gap near the tub; it is hard to make the connection.

Williams opinion: There is a gap in the trim near the bottom of the tub in the downstairs bathroom.

Item 45

VenRoy: The drywall in the downstairs living room has some rough spots.

Peter Brown: Brown sanded and painted the living room. The repair took an hour.

Mlynarchek: There were problems with the drywall throughout the house.

Williams opinion: The drywall problem in the downstairs living room walls has been fixed. There is no existing defect. Mr. Brown did not testify how much it cost to fix the problem.

Item 46

VenRoy: The ceiling in the downstairs living room has spots that were primed but not painted. To correct the paint problem now, the whole room would need to be repainted.

Brown: Areas around the lights need painting.

Mlynarchek: There were problems with the drywall throughout the house.

Williams opinion: The downstairs living room ceiling has inadequately painted areas.

Item 48

VenRoy: There is water damage around the window in the downstairs living room.

Brown: The north window shows signs of leakage.

Mlynarchek: Mr. Mlynarchek recalls that he saw no damage.

Williams opinion: There was evidence of water leakage around the window in the downstairs living room.

Item 50

VenRoy: There were rough spots in the drywall in the office area, as in other rooms.

Mlynarchek: There were drywall problems throughout the house.

Williams opinion: There were rough spots in the drywall in the office area.

Item 51

VenRoy: There is a slight gap behind the light switch in the office. It should be flush with the wall.

Mlynarchek: Did not recall seeing that, but concedes that it can happen.

Williams opinion: The light switch plate in the office area is not flush with the wall.

Item 53

VenRoy: There was water damage in the ceiling of the toy room.

Brown: There was a leak. Mlynarchek fixed it.

Mlynarchek: Water stain on ceiling; Mlynarchek could not see where the water came from.

Williams opinion: Mr. Mlynarchek fixed the ceiling in the toy room. There is no existing workmanship problem.

Item 54

VenRoy: the corners of the trim around the door in the toy room do not fit tightly. The door was warped. It probably came from the manufacturer like that. The door could have warped after it was installed.

Mlynarchek: If it warped, it happened afterward.

Williams opinion: The door to the toy room was warped. Doors do not warp after one or two years of use; this is a construction or manufacturing problem for which the builder is responsible.

Item 56

VenRoy: The drywall in the guest room had (unspecified) problems.

Mlynarchek: There were drywall problems throughout the house.

Williams opinion: The drywall in the guest room had problems. Like the other rooms, it was probably rough in spots.

Item 57

VenRoy: A painted shelf or ledge in the guest room was crooked.

Brown: The pieces of trim did not join each other properly; they were .25" off.

Mlynarczek: Does not know what the problem is.

Williams opinion: The shelf or ledge in the toy room is crooked or poorly mitred.

Item 58

VenRoy: In the guest room, there was a gap behind the door trim. It was either a drywall or a trim problem.

Mlynarczek: Does not know.

Williams opinion: There was a gap between the wall and the door trim in the guest room.

Item 59

VenRoy: The carpet near the door of the guest room was unacceptable.

Mlynarczek: The carpet people did not put enough filler under the carpet.

Williams opinion: Carpet is the builder's responsibility under item 22 of the specifications. It is poorly laid in the guest room near the door.

Item 62

VenRoy: There was no trim or insulation around the window in the utility room. It was an unfinished room. The window was not sealed.

Brown: Window was just "in there" without being enclosed.

Mlynarchek: The homeowner was responsible for installing insulation in that window. The room was not to be finished; trim was not required.

Williams opinion: The window was not sealed or insulated. Insulation was the builder's responsibility under item 11 of the specifications.

Summary of Construction Defects

In short, my findings on the alleged workmanship defects are as follows:

Item 2 The french door did not latch properly because the deadbolt could not properly enter the strike plate.

Item 3 There was a screw missing from the handle of the french door in the kitchen

Item 4 The exterior molding of the french door leading to the kitchen had a piece broken or missing at the bottom.

Item 10 Around the south wall window in the gathering room, there is a gap between the trim and the wall, perhaps due to a drywall crack.

Item 17 The finish on the wooden rail or trim on the stairwell is too thin.

Item 18 There is condensation over the door in the stairwell, as evidenced by staining, which suggests a gap in insulation.

Item 19 The light switch plate at the head of the stairwell and the cold air return are not flush with the wall.

Item 20 There are rough spots and wavy seams in the drywall.

- Item 21 A closet door was warped and out of square.
- Item 22 The door to the garage was either unpainted or painted poorly.
- Item 23 There were concrete spatters on the trim around the outside front door.
- Items 24&26 Some sections of poured concrete are flawed.
- Item 27 The closet doors are uneven and should have been adjusted.

- Item 28 The walls had rough spots; perhaps they were insufficiently sanded in some spots.
- Item 29 Parts of the ceiling in the master bedroom were inadequately painted.
- Item 31 The bathroom door in the basement was crooked and did not catch.
- Item 32 The door trim was too short.
- Item 33 The cracked wall near the shower off the master bedroom has been fixed.
There is no existing defect. Mr. Brown did not testify how much it cost to fix the problem.

- Item 35 There is air flow around the window trim, indicating either no insulation or a gap in the insulation.

- Items 36&42 The counter top is not level. Shims may be a solution; they need not be made of wood.

- Item 37 The door to the small bathroom is not finished, and the sink in the small bathroom is not properly trimmed.

- Item 38 The main bathroom door was hung off center.

- Item 39 The wall in the upstairs bedroom was rough and unsanded. The inspector did not cite the bulge problem.
- Item 41 The closet doors in the upstairs bedroom are crooked.
- Item 43 There was a problem with the drywall in the downstairs bedroom.
- Item 44 There is a gap in the trim near the bottom of the tub in the downstairs bathroom.
- Item 45 The drywall problem in the downstairs living room walls has been fixed. There is no existing defect. Mr. Brown did not testify how much it cost to fix the problem.
- Item 46 The downstairs living room ceiling has inadequately painted areas.
- Item 48 There was evidence of water leakage around the window in the downstairs living room.
- item 50 There were rough spots in the drywall in the office area.
- Item 51 The light switch plate in the office area is not flush with the wall.
- Item 54 The door to the toy room was warped. Doors do not warp after one or two years of use; this is a construction or manufacturing problem for which the builder is responsible.
- Item 56 The drywall in the guest room had problems. Like the other rooms, it was probably rough in spots.
- Item 57 The shelf or ledge in the toy room is crooked or poorly mitred.
- Item 58 There was a gap between the wall and the door trim in the guest room.
- Item 59 The carpet is uneven in the guest room near the door.

Item 62 The utility room window was not sealed or insulated.

Restitution

Mr. Brown argues that it will cost \$9,000 or \$10,000 to fix the problems cited in the inspection report. Mr. Brown offered written estimates from contractors in an attempt to substantiate his cost estimate, but since the contractors who wrote the estimates did not testify, I refused to admit them in evidence. Mr. VenRoy estimates that it will cost \$6,000 or \$7,000 to fix the problems. I recommend restitution of \$6,500, the mid-point of Mr. VenRoy's range.

CONCLUSIONS OF LAW

The complaint alleges a violation of 1979 AC R 338.1551(4), which reads:

(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

In this case, the construction defects are relatively minor, many are cosmetic, and none affect the structural integrity of the house or pose a danger or hazard to the owners. Accordingly, I find no violation of 1979 AC R 338.1551(4) or MCL 339.604(c).

Nor is there enough evidence to conclude that Mr. Mlynarchek departed from the plans and specifications. No drawings are in evidence, only specifications, and Mr.

VenRoy did not testify that Mr. Mlynarchek deviated from either the drawings or specifications. The workmanship defects are primarily cosmetic. Accordingly, I find no violation of MCL 39.2411(2)(d).

The construction defects cited in this case are workmanship defects, as described in MCL 339.2411(2)(m), "... workmanship not meeting the standards of the custom or trade verified by a building code enforcement official." Mr. VenRoy has verified the defects. Mr. Mlynarchek has violated MCL 339.2411(2)(m) as detailed above.

DECISION

Mr. Mlynarchek violated MCL 339.2411(2)(m) as detailed above.

PROPOSED SANCTIONS

Restitution of \$6,500 is appropriate under MCL 339.602(h).

Erick Williams
Administrative Law Judge