

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

In the matter of

Docket No. 2001-1738

Bureau of Commercial Services,
Petitioner

Agency No. 21-01-0118-00

v

Agency: Bureau of Commercial
Services

Alvin O. McMurray
dba McMurray Construction
Company,
Respondent

Case Type: Sanction

Issued and entered
this 7th day of June 2002
by Gregory Holiday
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the filing of a Notice of Hearing upon a Formal Complaint dated July 30, 2001, charging Respondent with one or more violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*, Respondent was afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondent failed to satisfactorily demonstrate compliance and, as a result, the matter was set and noticed for a formal hearing.

The hearing was scheduled to be held on November 15, 2001, at the Bureau of Hearings of the Department of Consumer and Industry Services, 1200 Sixth Street, Eighth

Floor, Detroit, Michigan. Due to a scheduling conflict, the hearing was postponed to December 11, 2001 at 9:30 a.m. At that hearing, the parties agreed to continue to hearing to Wednesday, February 13, 2002 at 9:30 a.m. At Respondent's request, the continued hearing was postponed to Monday, March 18, 2002, and the same proceeded as scheduled. Gregory Holiday presided as Administrative Law Judge. Larry Jensen, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Jaiminkumar Pandya, Walter L. Cross and Mitchel Hampton testified for Petitioner. Alvin O. McMurray dba McMurray Construction Company (Respondent) appeared on his own behalf. Harold Hall testified for Respondent.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Respondent violated the Code, with respect to the practice of a residential builder or residential maintenance and alteration contractor. The specific issues are whether Respondent violated Builder Rule 1979 AC, R 338.1551(5) and Sections 604(c) and 2411(2)(e) and (m) of the Code, which provide, in pertinent part:

Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(c) Violates a rule of conduct of an occupation.

Sec. 2411...(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

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

Rule 338.1551(5) Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.

EXHIBITS

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Copy of 12/15/00 Building Inspection Report
2	Copy of 12/13/01 Report of Building Inspection by Mr. Pandya
3	Copy of 6/15/00 Retail Installment Contract - Home Improvement
4	Copies of 3 checks totaling \$28,000.00
5	Statement of Complaint of Walter L. Cross with copy of Quality Assessment Report from Accurate Home Inspections attached
6	2/12/02 Estimate from A&M and Associates, Inc. totaling \$32,814.00

7 Copy of 6/14/00 Claim of Lien filed by McMurray Construction Co. for \$13,350.00

Respondent offered no additional exhibits for consideration at the hearing.

FINDINGS OF FACT

In about June 2000, Respondent contracted with Walter L. Cross to construct a room addition and a front porch addition to the Cross home located at 19195 Avon, Detroit, Michigan, for a total price of \$36,350.00 (See Petitioner Exhibit 3). Mr. Cross paid Respondent a total of \$28,000.00 in three separate Official Checks (See Petitioner Exhibit 4). Respondent assigned Harold Hall to oversee the project and to perform much of the work. Privately and as an aside, Mr. Cross arranged for Mr. Hall to perform additional work not set forth in the contract without Respondent's knowledge or consent. During construction, the project passed required inspections to the point where Respondent received permission to "cover the floor". Mr. Cross had some concerns about the way the project was being handled. In a letter, Mr. McMurray offered to replace Mr. Hall with someone else, but Mr. Cross wanted Mr. Hall to remain on the project at that time.

Mr. Cross remained dissatisfied with portions of the work and, at his own expense, had an inspection performed by Accurate Home Inspections on November 27, 2000. Upon receiving the results of that inspection, Mr. Cross was no longer satisfied with having Mr. Hall perform work. He filed his Statement of Complaint with the Department of Consumer and Industry Services' Bureau of Commercial Services and attached a copy of the Quality Assessment Report prepared by Accurate Home Inspections (See Petitioner Exhibit 5).

At the Department's request, a complaint inspection was performed by City of Detroit Building Inspector Jaiminkumar Pandya on about December 15, 2000. Both Inspector Pandya and another Detroit Building Inspector had already performed several routine inspections on the project. From the complaint inspection, Mr. Pandya identified the following seven items as problems with the project:

Item 1 - Make repairs to uneven floor - According to Inspector Pandya, the area connecting the new addition has a slope, is a tripping hazard and also has a lot of cracked tiles. According to Mr. Hall, they repaired some uneven tiles.

Item 2 - Install Kitchen cabinets [sic] in workmanlike manner - Mr. Cross observed water coming in behind the kitchen cabinet. According to Inspector Pandya, the cabinets weren't completely attached to the wall surface; there were gaps for insect pests, etc. He recognizes that every wall is not smooth, and it is possible to caulk areas where the gap isn't too large. In his opinion, the gap he saw was too large to caulk. According to Mr. Hall, (1) the cabinets aren't connected directly to the ceiling, (2) there is a crown molding and caulk at the point where they meet the ceiling, and (3) the cabinets have adjustable hinges to square all the cabinet door.

Item 3 - Install window sills in workmanlike manner - According to Mr. Cross, the window appeared about 1/4 inch uneven. According to Inspector Pandya, the windows were finished but were not level, though he couldn't recall how far off they were. He concedes that he didn't use a level to check the windows and that they operate properly.

Item 4 - Make necessary repairs to roof so as to exclude the elements - Again, Mr. Cross felt that a roof leak was allowing water to come in behind the kitchen cabinet. Mr. Cross concedes that prior to Respondent's construction, his dormer was leaking at the southern end, though not near the kitchen cabinets. Inspector Pandya verified evidence of water leakage from behind the kitchen cabinets but did not identify the cause or source. According to Mr. Hall, in doing the roof work for the addition, they pulled back three feet of roofing from the existing roof to install flashing and he saw no evidence of leakage. In addition, Mr. Hall pointed out that Mr. Cross had the roof covered with tarp (and nailed) before Respondent could test for water leakage and the tarp nails into the roof provided additional leakage opportunities.

Item 5 - Provide required fasteners at kitchen door - According to Inspector Pandya, a door knob was loose and a required latch was not installed. According to Mr. Hall, the door fastener, which costs about \$7.00, was not a part of the contract.

Item 6 - Provide adequate bearing for floor joist - Inspector Pandya verified that the floor joist problem has been corrected, though he points out a need to provide support for the main beam. According to Mr. Hall, someone (not connected with Respondent) cut some of the floor joists. Nevertheless, Mr. Hall had them replaced.

Item 7 - Provide required smoke detectors - Mr. Cross reports that this item was taken care of.

When Mr. McMurray requested that a different inspector view the project, Mr. Pandya returned with Senior Inspector James for another inspection on December 13, 2001.

In that inspection, they identified additional items not set forth on the December 13, 2000 Building Inspection Report and reported them in the December 20, 2001 Report of Inspection (Petitioner Exhibit 2¹). Inspector Pandya returned to the Cross home on March 13, 2002 and there was no change in the status of the items from his December 15, 2000 inspection.

Mr. Cross obtained an estimate of \$32,814.00 from Mitchel Hampton of A&M Associates to essentially gut the project and redo all of the work. While Mr. Hampton provided an estimate, he is not willing to do the work because he couldn't be sure about whether the footings were laid properly. That estimate is of no value in this proceeding since no finding is being made that the entire project required gutting and redoing.

In between the two hearings in this matter, Mr. Cross let Mr. McMurray into his home once to inspect complaint items. When Mr. McMurray returned with the Mr. Hall, Mr. Cross refused to permit entry. The next time Mr. McMurray called Mr. Cross to seek permission to enter and perform repairs, Mr. Cross advised Mr. McMurray that Mr. McMurray would not be allowed into the home without a building inspector being present. In response, Mr. McMurray came out one day with a building inspector but without a worker. No additional repairs have been performed on the project. Respondent filed a Claim of Lien (Petitioner Exhibit 7) against the Cross home claiming a balance due of \$13,350.00.

CONCLUSIONS OF LAW

¹ The additional items in the Report of Inspection are not alleged in the Formal Complaint and cannot form the basis of any violation.

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading & Practice (2d ed) § 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. 1990 AACRS, R 339.1763.

VIOLATION OF SECTION 604(C) OF THE CODE

By this charge, Petitioner asserts that Respondent violated Builder Rule 338.1551(5), thereby violating Section 604(c) of the Code.

Builder Rule 338.1551(5) requires that the standards of construction be in accordance with the local building code. A violation of, or failure to comply with, the building code does not constitute a violation of Builder Rule 338.1551(5). Building Code violations are addressed under Section 2411(2)(e) of the Code and are required to be willful in order to constitute a violation. As with any administrative rule, Builder Rule 338.1551(5) must be construed in light of the statute it is based upon, in this case, the Code. Construing Builder Rule 338.1551(5) in the manner sought would conflict with Section 2411(2)(e) of the Code. The Michigan legislature determined that as to building code violations, in order to constitute a misconduct under Section 2411(2)(e) of the Code, the violation must be willful. Where there is conflict between a rule and a statute, the statute controls. *Michigan Sportservice, Inc v Commission of Dept of Revenue*, 319 Mich 561; 30 NW2d 281 (1948). Builder Rule 338.1551(5) can be construed to avoid a conflict with Section 2411(2)(e) of the Code. In construing Builder Rule 338.1551(5) in light of Section 2411(2)(e) of the Code, Builder Rule 338.1551(5) governs the standards that are used by a builder or contractor. Where the builder

or contractor knows what the applicable building code requires and, despite that knowledge, elects to use and follow other standards, then a violation of Builder Rule 338.1551(5) is established. For example, where the contractor and the homeowner agree privately that the contractor need not replace rotted roof boards before re-roofing, despite the contractor's knowledge that the applicable building code requires their replacement, the contractor would be in violation of Builder Rule 338.1551(5). That willful violation may also constitute a violation of Section 2411(2)(e) of the Code. If, on the other hand, the contractor simply failed to replace some of the rotted roof boards without any decision to use other standards in place of the applicable building code, there would be no violation of Builder Rule 338.1551(5). There is no violation of Builder Rule 338.1551(5).

Accordingly, no violation of Section 604(c) has been proven.

VIOLATION OF SECTION 2411(2)(E) OF THE CODE

By this charge, Petitioner asserts that Respondent wilfully violated building laws, in violation of Section 2411(2)(e) of the Code.

Section 2411(2)(e) of the Code sanctions a builder or contractor who wilfully violates building laws. In this case, while the Formal Complaint cites the violation of building laws, there is no allegation that the violation was wilful. It would be inappropriate to draw an inference, based upon the pleadings, that Respondent's violation of building laws was willful. Accepting as true the facts set forth in the Formal Complaint, there is no basis to find that Respondent wilfully violated building laws. For that reason, no violation of Section 2411(2)(e) of the Code has been established.

Accordingly, Petitioner has not proven any violation of Section 2411(2)(e) of the Code.

VIOLATION OF SECTION 2411(2)(M) OF THE CODE

By this charge, Petitioner asserts that with respect to the Cross project, Respondent practiced poor workmanship, or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Inspector Pandya verified several items of poor workmanship on the Cross project. Respondent's position that Mr. Cross prevented corrections does not negate the fact that there were workmanship violations on the project. A builder or contractor is required to do the job right the first time. *Arndt v Dept Licensing & Regulation*, 147 Mich App 97; 383 NW2d 136 (1985). In this case, when Respondent tendered the project to Mr. Cross as complete, there were workmanship violations in existence. While the City of Detroit Building Department bears some responsibility for issuing a final approval on the project before its complaint inspections which disclosed violations, Respondent bears the ultimate responsibility for workmanship on the project. The uneven floor connecting the addition, the kitchen cabinet installation and the un-level window sills were items of poor workmanship on the Cross project.

Accordingly, Petitioner has proven by a preponderance of the evidence, that Respondent violated the workmanship requirements of Section 2411(2)(m) of the Code.

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent violated Section 2411(2)(m) of the Code as described in this Hearing Report. Petitioner recommended that sanctions include restitution to Mr. Cross in the amount of his \$32,814.00 estimate.

It is recommended that the Board include the following as sanctions in this matter:

1. Payment of a civil fine in the amount of \$1,000.00.
2. No restitution to Walter Cross recognizing that the \$8,350.00 he owes on the contract likely meets or exceeds the true cost of correcting the defects found here.
3. In the event the civil fine has not been paid within 60 days following the issuance of a final order, then all Article 24 licenses should be suspended and no new or renewal licenses should be issued until the civil fine has been paid.

Gregory Holiday
Administrative Law Judge