

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

In the matter of

Docket No. 2001-14

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-0329-00

v

**Agency: Bureau of Commercial
Services**

**Harrison James Holey, Jr.
dba McMann Construction Company,
Respondent**

Case Type: Sanction

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**Issued and entered
this 14th day of February, 2001
by Erick Williams
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

A July 2000 complaint alleges that Mr. Holey did poor work on a basement remodeling job in Westland. A hearing convened in February 2000. Tracey L. Hampton represented the state. Harrison Holey participated without a lawyer. This opinion finds the complaint substantiated.

ISSUES AND APPLICABLE LAW

MCL 339.604(c); MSA 18.425(604)(c) reads:

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.

MCL 339.2411(2)(m); MSA 14.825(2411)(2)(m) reads:

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

(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

Judith Birch contracted with Mr. Holey in March 1999 to finish the basement in her townhouse apartment. She paid Mr. Holey in full, about \$4,000 altogether, including electrical work. Work started in March 1999 and ended in July 1999. Work was sporadic since Mr. Holey lives about 100 miles away from the job site.

The work involved construction of a wall and a door across the basement, drywall and paneling the walls, various electrical items, floor tile, a drop ceiling, and trim. The contract does not itemize the cost associated with specific elements of the remodeling job. The only records we have come from Ms. Birch's payment records, some of which are itemized and some not.

The contract was in two parts. One room was to be finished; then Ms. Birch, at the demand of her landlord, asked Mr. Holey to finish both rooms in the basement. The contract was then modified, and the price increased. The contract has been paid in full.

After the job was finished, a local building inspector issued final approval. However, Ms. Birch was not satisfied with the quality. She tried in August 1999 to get Mr. Holey to fix it. They had a meeting in October 1999. At the October meeting, Mr. Holey agreed that corrective work was needed. But the two disagreed over the extent of the corrective work. Ms. Birch wanted a new floor, or a new floor in one of the rooms. Mr. Holey maintained that only partial replacement of some tiles was needed. Mr. Holey and Ms. Birch never got beyond that impasse.

At some point, months later, Ms. Birch decided that she did not want Mr. Holey back to correct the work. Ms. Birch says she offered to let Mr. Holey come back to fix the job, and he made several appointments but never showed up. Mr. Holey recalls that he made several attempts to fix the problems, but Ms. Birch would not let him into the house. In my opinion, there is equally strong evidence on both sides of that issue, so it is not clear whether Mr. Holey had a chance to perform corrective work.

Ms. Birch filed a complaint in November 1999 and had the basement inspected. Paul Featherston, a building inspector for Westland, visited the site. Mr. Featherston was not the same inspector who had done the final inspection on the building permit. Mr. Featherston visited the job on March 25, 2000. He found some defects, described below.

Basement Floor Tiles

Mr. Featherston made the following observations: The basement floor needed to be cleaned. There was too much glue. There were cracked tiles and glue in many places throughout the basement. The tile is unevenly cut near the walls and around pipes. The work needs to be repaired. This is a workmanship violation. There are no written standards. The cost to fix this problem would not be high. This is not a major or a structural problem. An entire new floor might be cheaper to install than attempting to replace selective tiles, since it is difficult to replace tiles without damaging adjacent tiles, and contractors don't like to work over other contractors' work.

Robert Schonfelder, the employee of Mr. Holey's who laid the floor, admitted there was excess glue on some tiles, and the floor looked like it was not finished. Tiles often are covered with excess glue when they are first laid; then the workers clean it off. This floor was not cleaned.

Mr. Holey agrees that the floor is defective. He estimates that only 10% or 15% of the floor needs to be replaced.

Ms. Birch's records, Exhibit 3, show a May 12, 1999, payment to Home Depot of \$277.72 for tile and adhesive, and a July 27, 1999, payment of \$200 to lay the second half of the basement. I assume that the cost of the whole basement floor was about \$677.72, that is, \$200 to lay the first half, \$200 to lay the second half, and \$277.72 for materials.

Basement door

There was missing molding around the back side of a door. This is a safety problem; doors should have molding to prevent splinters, nail pokes, and caught fingers. Poor workmanship. There are no standards on workmanship, just Featherston's judgement. The cost to fix this problem is not high. This is not a major problem. This is not a structural problem.

Basement Case Molding

Mr. Featherston found that the casing around the top of the walls is unsightly. Poor workmanship. There are no written standards. The cost to fix this problem is not high. This is not a major problem. This is not a structural problem.

Basement Ceiling

Mr. Featherston found that the drop ceiling in the basement was level around the sides, but sank and was wavy in the middle. It can easily be adjusted to make it level. It is poor workmanship, an aesthetic problem. There are no written standards. The cost to fix this problem is not high. This is not a major problem. This is not a structural problem. Featherston did not look behind the ceiling panels.

Robert Schonfelder, the employee who installed the ceiling, testified that there is a cast iron pipe under the ceiling. The ceiling had to be dropped to accommodate the pipe. Mr. Schonfelder recalls that he showed Ms. Birch the problem, and she told him to make the ceiling as high as possible. From that, Mr. Schonfelder concluded that she wanted him to put a hump in the ceiling around the pipe, rather than drop the whole ceiling to the lowest level.

Mr. Schonfelder estimates that fixing the ceiling would take about an hour and cost \$150.

Presumably, Ms. Birch now feels that she did not want a hump in her ceiling.

There is no written agreement to put a hump in the ceiling. I cannot conclude from Mr. Shonfelder's testimony alone that there was a verbal agreement. Accordingly, the normal standards of workmanship apply. This is a workmanship violation.

Base Molding

Mr. Featherston found that the base molding near the floor has gaps. It is poor workmanship, unsightly. There are no written standards on workmanship.

Cost of Repairs

Mr. Featherston estimates that two people working for one day can fix all these problems, except the floor tiles. The amount of work to fix the floor will depend on how many tiles need to be replaced.

Mr. Schonfelder estimates that fixing the molding and trimming the door would require 3.5 hours and cost \$275.

The cost of the corrective work can only be roughly approximated. My estimate is based on the following assumptions: (1) 50% of the floor needs to be replaced; (2) Ms. Birch paid \$677.72 for the floor; so the cost of replacing 50% of the floor is \$338.86. Also assuming (3) that builders charge \$100 per hour; and (4) Mr. Featherston's estimate of 8 hours work is accurate for the ceiling and trim, then the cost of fixing the ceiling and trim is \$800. Thus the total cost of corrective work is \$1,138.86.

CONCLUSIONS OF LAW

The building inspector's analysis of the problems in this case is not really contested. Both Mr. Holey and Mr. Schonfelder agreed, for the most part, with Mr. Featherston's description of the job. The basement floor tiles are cracked and covered with glue. Trim is missing around the door, the ceiling is uneven, and the molding is not properly joined. Accordingly, Mr. Holey is in violation of MCL 339.2411(2)(m); MSA 14.825(2411)(2)(m).

There is a conflict of testimony on whether Mr. Holey offered to perform corrective work and whether Ms. Birch allowed him to. Given the parties' dispute over the extent of corrective work, it is plausible that Ms. Birch resisted letting Mr. Holey into her house as long as he planned to patch -- not replace -- the basement floor. The evidence is about equal on both sides. Since the state has the burden of proof, Mr. Holey should win that point. In my opinion, there is not enough evidence to prove that Mr. Holey failed to perform corrective work. Because the evidence is equally balanced, I find no violation of MCL 339.604(c); MSA 18.425(604)(c) or 1979 AC R 338.1551(4).

DECISION

Mr. Holey violated MCL 339.2411(2)(m); MSA 14.825(2411)(2)(m).

PROPOSED SANCTIONS

MCL 339.602; MSA 14.825(602), reads:

A person, school, or institution which violates a section of this act or a rule or order promulgated or issued under this act shall be assessed one or more of the following penalties:

- (a) Placement of a limitation on a license or certificate of registration for an occupation regulated under articles 8 to 25.
- (b) Suspension of a license or certificate of registration.
- (c) Denial of a license, certificate of registration, or renewal of a license or certificate of registration.
- (d) Revocation of a license or certificate of registration.
- (e) A civil fine to be paid to the department, not to exceed \$10,000.
- (f) Censure.
- (g) Probation.
- (h) A requirement that restitution be made.

An award or restitution is appropriate in this case, since the value of the job is diminished by the cost of replacing defective work. A rough approximation of the cost of replacing defective work is \$1,138.86, and that is the appropriate restitution award.

Erick Williams
Administrative Law Judge