STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS

DANIEL R. COSTELLO
License No. 21-01-057912

Docket No. 2002-1433
Complaint No. 9080
Former Complaint No. 21-01-0155-00

_____/

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on March 2, 2004;

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Erick Williams, Administrative Law Judge, dated January 21, 2004,

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Daniel R. Costello, Licensed Residential Builder, License No. 21-01-057912, hereafter "Respondent", having been found in violation of Sections 2411(2)0); 2411(2)(m) of the Michigan Occupational Code, 1980 P.A. 299, *as amended,* hereafter the "Code", MCL 339.2411(2)0); MCL 339.2411(2)(m);

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

IT IS HEREBY ORDERED, that the following penalties authorized by Section 602 of the Code are hereby imposed:

1. **Respondent shall pay a FINE in the amount of Two Thousand Five Hundred Dollars and 001100 Cents ($2,500.00), said fine shall be paid to the Department of Labor & Economic Growth within sixty (60) days from the mailing date of this Final Order. Said fine shall be paid by cashier's check or money order, with Complaint No.9080 clearly indicated on the check or money order, made payable to the State of Michigan and sent to the Department of Labor & Economic Growth, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909.**

2. **Respondent's failure to comply with each and every condition of this Final Order will shall result in suspension of any and all Article 24 licenses held by Respondent, MCL 339.2405(3). Respondent may not serve as Qualifying Officer of any licensed corporate entity if any other license he holds or has held is in suspended status. No application for licensure, re-licensure or reinstatement shall be considered by the Department until the fine imposed by this Final Order is paid-in-full.**

3. **Respondent shall submit in writing to the Michigan Department of Labor & Economic Growth, Bureau of Commercial Services, Audit Unit, P.O. Box 30018, Lansing, Michigan 48909, proof of compliance, in a form acceptable to the Department, with each and each and every requirement of this Final Order.**

This Final Order shall not be construed as limiting the Department of Labor & Economic Growth, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the payment imposed by this Final Order.

Failure to comply with the provisions of this Final order is itself a violation of the Code pursuant to Section 604(k) and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this ____day of_____, 2004.

BY: _____
Mark T. Glynn, Chairperson

Date mailed: _____

Proof of Compliance should be filed with:

Department of Labor & Economic Growth
Bureau of Commercial Services
Enforcement Division
Audit Unit
P .O. Box 30018
Lansing, MI 48909

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH

In the matter of	**Docket No. 2002-1433**
Bureau of Commercial Services, **Petitioner**	**Agency No. 21-01-0155**
v	**Agency: Bureau of Commercial Services**
Daniel R. Costello, **Respondent**	
_____/	**Case Type: Sanction**

Issued and entered
this 21st day of January 2004
by Erick Williams
Administrative Law Judge

HEARING REPORT

In June 2002, the Bureau of Commercial Services issued a complaint against Daniel Costello, under the Occupational Code, MCL 339.101 *et seq.*, regarding a kitchen-remodeling job in Houghton Lake. A hearing convened on 9 January 2004 under the Administrative Procedures Act, MCL 24.201 *et seq.* Tracey Hampton-Yarborough represented the Bureau of Commercial Services. Mr. Costello drove to Traverse City for the hearing, but because of health problems, he left before the hearing started and did not participate in person; James Hafke represented him. This opinion finds that Mr. Costello violated MCL 339.2411(2)(j) (aiding an unlicensed firm) and MCL 339.2411(2)(m) (poor workmanship).

ISSUES AND APPLICABLE LAW

The complaint charges violations of MCL 339.601(1), MCL 339.2411(2)(j) and MCL 339.2411(2)(m). MCL 339.601(1) reads:

> A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.

MCL 339.2411(2)(j) reads:

> (2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6: ...
>
> (j) Aiding or abetting an unlicensed person to evade this article, or knowingly combining or conspiring with, or acting as agent, partner, or associate for an unlicensed person, or allowing one's license to be used by an unlicensed person, or acting as or being an ostensible licensed residential builder or licensed residential maintenance and alteration contractor for an undisclosed person who does or shall control or direct, or who may have the right to control or direct, directly or indirectly, the operations of a licensee.

MCL 339.2411(2)(m) reads:

> (2) 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.

FINDINGS OF FACT

Al and Maxine Galloway own a house at 1222 Shoreline Dr, Houghton Lake, MI. Daniel Costello operates a business, called the Building Center, in Houghton Lake. In May 2000, the Galloways visited the Building Center. As Al Galloway recalls, Mr. Costello told the Galloways that he owned the Building Center. Also present at the Building Center during the Galloways' visit were Mr. Costello's wife and some other employees. The Galloways contracted with the Building Center to remodel their kitchen. Mr. Costello represented the Building Center during the negotiations, and he signed the Building Center quote.

Altogether, the Galloway's paid $40,000 to the Building Center in two payments -- a $15,000 check on 7 June and a $25,000 check on 15 September. Both checks were signed by Maxine Galloway, payable to the Building Center, and deposited in the Building Center's bank account.

Mr. Costello started work in September 2000. As Mr. Galloway recalls, Mr. Costello did most of the work himself, with the occasional assistance of a worker named Zilke.

Mr. Costello is a licensed builder. However, the Building Center is not licensed.

In October 2000, the Galloways became dissatisfied with the work being done. They contacted the Houghton Lake building official, Thomas Ackley, who visited the site in October 2000, December 2000 and February or March 2001. Mr. Ackley wrote a report after his 15 December 2000 inspection. The first page of the December inspection report is on a state government form. The instructions on the form read:

> Inspector: Identity each item the consumer has listed on the statement of complaint (i.e. 1,2,3), inspect the building project and document if the items are workmanship or code violations. If they are not workmanship or code violations, check the box marked "no violation" ... [Exhibit 6a]

The instruction form contains four columns. The first column heading reads: "Enter Items identified in the statement of complaint. Indicate the nature of the complaint, location and whether it is a workmanship or code violation, or no violation." In that column, Mr. Ackley entered three items as follows:

> #1. Cabinets not fitted properly. #2. Soffit material not fitted together properly. #3. Flooring, tile, installed with uneven grout lines. Leaving an unappealing looking floor. [Exhibit 6a]

The second column asks inspectors to flag any of the numbered items that are workmanship violations. Mr. Ackley cited all three items as workmanship violations.

The third and fourth columns ask inspectors to cite any building code violations. In those columns, Mr. Ackley cited all three items as violations of 1996 BOCA 115.1, which reads:

> All work shall be conducted, installed and completed in a workmanlike and acceptable manner so as to secure the results intended by this code.

In a letter attached to his December report, Mr. Ackley described the workmanship as follows:

> A building permit was not required for this project, however the homeowner is unhappy with the workmanship. After looking over the project, all work appears to have been done by inexperienced and unprofessional laborers. Examples of this poor workmanship include cabinets, and the soffit material over the cabinets, not being fitted together properly. Also, the flooring was installed incorrectly, leaving inconsistent gaps in the grout and causing flooring to not line up properly.... Exhibit 6b

Mr. Ackley testified that the cabinets, prefabricated, were not fit together properly; there were gaps up to about 1/8" wide. Usually workers can fit cabinets together without such gaps; in this case, that was not done. The "soffits" (i.e., wood molding strips near the ceiling) had similar 1/8" gaps. The floor tiles (approximately 1' square vinyl tiles, separated by strips of grout) should have been laid in straight lines, however several were misaligned, the grout lines were not straight, and some grout lines were wider than others when they should have been of uniform width. Also, the floor tiles should have been laid level; however, one or two floor tiles were vertically misaligned, resulting in a floor level change of 1/4" where tiles met at different

elevations. A videotape taken by the Galloways (Exhibit 5) shows some of these defects.

On cross-examination, Mr. Ackley testified that there were not any health or safety issues raised by the defects in workmanship. The defects were primarily aesthetic.

Mr. Ackley's concession on cross-examination that the defects were not health hazards led to an exchange of arguments and a change of testimony. During his cross examination of Mr. Ackley, Mr. Hafke argued that the workmanship defects were not actionable since they were merely aesthetic and did not endanger anyone's health or safety. However, on redirect, Ms. Yarborough asked Mr. Ackley some leading questions, which provoked a change in his testimony. Mr. Ackley was led to agree that there is a slim possibility that someone might trip on a raised floor tile. Mr. Ackley was also led to agree that disease-causing bacteria might grow in some of the gaps in the cabinets. Mr. Ackley's testimony on cross-examination thus conflicted with his testimony on redirect examination.

In my view, Mr. Ackley's testimony on cross-examination regarding safety hazards deserves the greater weight. First, the bacteria-growing-in-gaps argument is farfetched, unsupported, and beyond Mr. Ackley's expertise. It deserves no weight. Second, the trip-hazard-from-uneven-tiles argument is not strong enough. Even on redirect, Mr. Ackley testified that the possibility of a person tripping on the uneven tile floor is "slim."

Also, various building code sections explicitly allow changes in level up to 1/4". For example, 1996 BOCA 1017.1.1, as well as the current state building code,

2000 MBC 1003.3.1.6, allow unbeveled 1/4" thresholds at doorways. The federal rules for handicap-accessible buildings, ICC/ANSI A117.1-1998, section 303, allow unbeveled vertical changes in floor level up to 1/4". Those provisions suggest that an abrupt 1/4" change in floor surface elevation is not considered a trip hazard.

For those reasons, Mr. Ackley's testimony on cross-examination is convincing. The defects in workmanship did not pose a safety or health hazard.

Although not hazardous, there were unsightly and annoying defects in workmanship. Mr. Ackley's report and testimony and the videotape of the kitchen establish that the cabinet installation, trim and floor covering were unsightly. Tile work that leaves abrupt 1/4" changes in floor level is annoying to walk on.

CONCLUSIONS OF LAW

1. Unlicensed Operation

The Galloway's contracted with the Building Center for their remodeling job, and they paid $40,000 to the Building Center. The Building Center deposited their payments in its bank account. Since the Building Center is not licensed to do remodeling work, it violated MCL 339.601(1), which reads:

> A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.

MCL 339.601(1) punishes people and organizations that do business without licenses. The Building Center violated the statute, not Mr. Costello. The Building Center is not a party here, so no violation of MCL 339.601(1) can be assessed against Mr. Costello.

Mr. Costello violated MCL 24.2411(2)(j). He owns and operates the Building Center. He negotiated the Galloway contract, signed the Building Center quote, performed work on the Galloway job, and collected money for the Building Center. Since licensed builders such as Mr. Costello are forbidden to work for unlicensed companies, Mr. Costello violated MCL 24.2411(2)(j).

2. Poor Workmanship

Mr. Ackley's report and testimony and the videotape of the kitchen establish that the cabinet installation, trim and floor covering were defective. Mr. Ackley also testified that the defective workmanship did not pose a health or safety hazard. The respondent does not contest the existence of workmanship defects but argues that, since the items of defective work were not hazardous, he cannot be held liable. I disagree. As I read the statute and building code, they contain two separate definitions of poor workmanship. Mr. Costello is liable under the statutory definition but not under the building code.

Mr. Ackley's December 2003 inspection report is on a state government form that asks inspectors to classify defective items as either "workmanship or code violations." Mr. Ackley cited three defective items. He classified all three as both workmanship and code violations. The 1996 BOCA Building Code was in effect in Houghton Lake at the time. The building code section that Mr. Ackley invoked for all three items was 1996 BOCA 115.1, which reads:

> All work shall be conducted, installed and completed in a workmanlike and acceptable manner so as to secure the results intended by this code.

1996 BOCA 115.1 limits poor workmanship to defective items that fail to "secure the results intended by the code" -- a reference to 1996 BOCA 101.4, which reads:

> This code shall be construed to secure its expressed intent, which is to ensure public safety, health and welfare insofar as they are affected by building construction, through structural strength, adequate means of egress facilities, sanitary equipment, light and ventilation, and fire safety, and, in general, to secure safety to life and property from all hazards incident to the design, erection, repair, removal, demolition or occupancy of buildings, structures or premises.

In short, the definition of poor work in the building code is limited to poor work that creates a safety hazard.

Although the building code prohibits poor workmanship, there is also a statutory prohibition at MCL 339.2411(2)(m), which forbids:

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

In its complaint against Mr. Costello, the Bureau of Commercial Services cited the statute, not the building code. So the statutory formula applies here.

The definition of poor work in the statute is broad. It embraces any work that is below trade standards and allows testimony from building inspectors to establish those standards. Poor workmanship under the stature might thus include bad-looking work as well as work that creates a hazard.

Bad-looking construction work is not trivial. Some work, like painting, trim and brickwork, is performed solely for its decorative value. If poor work meant nothing more than work that posed a safety hazard or created a structural weakness, then there would be no such thing as a sub-standard paint job. Also, bad-looking construction

work carries an economic cost. On resale, bad-looking work can reduce the value of a house by thousands of dollars.

That poor workmanship may include cosmetic defects is a proposition supported by case law. For example, in *Gould v Rhode Island Building Contractor's Registration Bd*, 1995 RI Super Lexis 64 (Superior Ct of Rhode Island, 1995), a general-jurisdiction trial court in Rhode Island let stand an administrative decision that imposed a fine against a builder for negligent and improper work. The defects included cosmetic items -- cracks in a fireplace, nail pops, and gaps between walls and ceilings. In *Tellis v Contractors' State License Board*, 79 Cal App 4th 153; 93 Cal Rptr 2d 734 (CA Ct of Appeals, 2000), the California Court of Appeals affirmed an administrative decision that imposed a fine against a builder for substandard work. The substandard work -- uneven kitchen floor tile -- was cosmetic. In *Mayerhofer v Three R's*, 597 S2d 151 (LA Ct of Appeals, 1992), the Louisiana Court of Appeals affirmed a damage award in a contract case involving cosmetic items -- uneven brickwork, kitchen cabinets that did not fit properly, and walls that were out of plumb and bulging. *Tentinger v McPheters*, 132 ID 620; 977 P2d 234 (ID Ct of Appeals, 1999), involved an unsightly paint job with overspray in some areas and inadequate paint coverage in other areas. (The painter won that case, but my point is unaffected; the court denied relief merely because the homeowner had not given the painter a chance to perform touch-up work.) *Redding v Snyder*, 352 Mich 241; 89 NW2d 471 (MI Sup Ct, 1958), involved a floor that was not level and windows that did not fit properly. The Michigan Supreme Court let stand a jury verdict for breach of contract. Damages were based on evidence that the workmanship defects (albeit cosmetic) reduced the value of the house by $2,000. The Supreme

Court also held that it was proper for the trial court to take evidence of trade practice to establish workmanship standards. In *Hernandez v Martinez*, 781 S2d 815 (LA Ct of Appeals, 2001), the Louisiana Court of Appeals approved a $2,000 offset against the contract price for an unsightly remodeling job that featured poor sanding and painting of wood trim, and skewed and uneven trim alignment.

In sum, none of the defects in Mr. Costello's work created a safety hazard, so Mr. Costello is not liable for poor workmanship under the building code's limited definition. On the other hand, poor workmanship under the statute means work that is below trade standards, which is a broader definition. Generally, substandard work includes bad-looking work as well as work that creates safety hazards or structural weaknesses. Mr. Costello's workmanship was poor under the broad statutory definition. The trim and tile work were unsightly; walking on the Galloway's floor was probably an annoying experience. Mr. Costello violated MCL 339.2411(2)(m).

DECISION

Mr. Costello violated MCL 339.2411(2)(j) and MCL 339.2411(2)(m). The MCL 339.601(1) charge is dismissed.

PROPOSED SANCTIONS

In this case, the Bureau of Commercial Services recommended a $2,500 fine and no restitution. Restitution was not recommended because the Galloways had received a damage award in parallel civil litigation.

_____

Erick Williams
Administrative Law Judge