

**Agenda
Item
III.B.1.**

State of Oregon

Board memo

Building Codes Division

February 18, 2010

To: State Plumbing Board

From: Liz Browder, Manager, Enforcement Services

Subject: Final Order on Tim A. Leslie, Case No. 2009-0202

Action requested:

Board to decide on adoption of proposed order and issuance of final order.

Discussion:

The case before the board involves Tim A. Leslie, an unlicensed individual. Following a complaint filed with the division, an investigation found Mr. Leslie installed a bathtub and associated water supply and drain piping in a private residence in Port Orford. The work occurred in about March 2008. On July 7, 2009, the division issued Mr. Leslie a notice of penalty on behalf of the board assessing penalties totaling \$5,500 for engaging in the business of plumbing without an Oregon plumbing contractor's license and making plumbing installations without an Oregon journeyman plumber's license or a permit.

A hearing was held on November 4, 2009 in the matter following a request by Mr. Leslie. On December 17, 2009, Administrative Law Judge (ALJ) Dove L. Gutman issued a proposed order finding Mr. Leslie had indeed violated Oregon licensing and permit requirements for plumbing installations. ALJ Gutman also found the proposed \$5,500 civil penalty was appropriate.

The proposed order and final order is attached for review. No exceptions were submitted.

Options:

- Issue a final order, adopting the proposed order with no changes.
- Amend the proposed order and ask that it be brought back to the next board meeting for consideration.
- Disapprove the proposed order, thus dismissing the case.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BUILDING CODES DIVISION**

IN THE MATTER OF:) **PROPOSED ORDER**
)
TIM A. LESLIE,) OAH Case No.: 901202
Respondent) Agency Case No.: 2009-0202

HISTORY OF THE CASE

On July 7, 2009, the Building Codes Division (Division) issued a Notice of Proposed Assessment of a Civil Penalty and Final Order on Default to Tim A. Leslie (Respondent). On July 20, 2009, Respondent requested a hearing.

On July 23, 2009, the Division referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing.

On September 3, 2009, the Division issued an Amended Notice of Proposed Assessment of a Civil Penalty and Final Order on Default to Respondent. On October 22, 2009, the Division issued a Second Amended Notice of Proposed Assessment of a Civil Penalty and Final Order on Default to Respondent.

On November 4, 2009, a hearing was held in Salem, Oregon. Respondent represented himself and testified. Senior Assistant Attorney General Katharine Lozano represented the Division. Brent Griffiths, Division Lead Enforcement Officer; Terry Swisher, Division Chief Plumbing Inspector; Pamela Berndt, homeowner; and Respondent all provided testimony. The record closed on November 4, 2009.

ISSUES

1. Whether, in March 2008, Respondent worked as a plumbing contractor by installing a bathtub and associated water supply and drain piping without an Oregon plumbing contractor's license in violation of ORS 447.040(1).
2. Whether, in March 2008, Respondent installed a bathtub and associated water supply and drain piping without an Oregon journeyman plumber's license in violation of ORS 693.030(1).
3. Whether, in March 2008, Respondent installed a bathtub and associated water supply and drain piping without first obtaining a valid plumbing permit in violation of OAR 918-785-

0200(1)(a).

4. Whether civil penalties in the amount of \$5,500 shall be assessed against Respondent.

EVIDENTIARY RULING

The Division's Exhibits A1 through A11 were admitted into the record without objection.

FINDINGS OF FACT

1. Respondent lives in Port Orford, Oregon. He considers himself a handyman and helps his neighbors with their plumbing needs. (Ex. A11 at 2-3.)
2. Respondent does not have a plumbing contractor's license in Oregon. He does not have a journeyman plumbing license in Oregon. (Test. of Griffiths; Exs. A1 at 2, A2, A3.)
3. Respondent does not have a plumbing business registration in Oregon. He does not have a Construction Contractor's Board registration in Oregon. (Test. of Swisher; Exs. A2, A3, A11 at 3.)
4. In January 2008, Respondent began working with Todd Schabeck, the owner of Curry Plumbing Services (CPS). Mr. Schabeck is not a licensed plumbing contractor. (Test. of Leslie; test. of Griffiths.)
5. Respondent believed he was an employee of CPS and was working as an apprentice plumber under Mr. Schabeck. Respondent did not receive any documentation from CPS that indicated he was an employee. Respondent did not apply for and was not registered for any apprenticeship program in Oregon. (Test. of Leslie; test. of Swisher.)
6. Sometime prior to March 2008, Pamela Berndt hired Mr. Schabeck to install plumbing in her home that was under construction at 905 King Street, in Port Orford. Mr. Schabeck completed the "rough-in" plumbing (piping in the walls and under the floor), but abandoned the remaining work. (Test. of Griffiths; Exs. A9 at 1, A11 at 3.)
7. In March 2008, Ms. Berndt hired Respondent to install plumbing in her home at 905 King Street, in Port Orford. Respondent installed a bathtub, hot and cold water fixtures, and drain piping. Ms. Berndt and her general contractor assisted Respondent with the installation. Respondent charged Ms. Berndt \$60 per hour for his labor. He also charged her for the materials that he furnished. Ms. Berndt paid Respondent \$1,236.50 for the plumbing installation. (Test. of Berndt; test. of Leslie; test. of Griffiths; Ex. A9 at 1-3.)
8. Respondent did not obtain a valid plumbing permit before beginning the plumbing installation at Ms. Berndt's home. (Test. of Griffiths.)
9. A plumbing permit is not transferable to an unlicensed person. (Test. of Swisher.)

10. A journeyman plumber's license and a plumbing business registration are required to engage in plumbing work on someone else's home. (*Id.*)

11. Respondent has no previous violations for unlicensed activities. (Test. of Griffiths.)

CONCLUSIONS OF LAW

1. In March 2008, Respondent worked as a plumbing contractor by installing a bathtub and associated water supply and drain piping without an Oregon plumbing contractor's license in violation of ORS 447.040(1).

2. In March 2008, Respondent installed a bathtub and associated water supply and drain piping without an Oregon journeyman plumber's license in violation of ORS 693.030(1).

3. In March 2008, Respondent installed a bathtub and associated water supply and drain piping without first obtaining a valid plumbing permit in violation of OAR 918-785-0200(1)(a).

4. Civil penalties in the amount of \$5,500 shall be assessed against Respondent.

OPINION

The Division contends that Respondent worked as a plumbing contractor without a license, installed plumbing without a journeyman plumbing license, and installed plumbing without first obtaining a plumbing permit. The Division further contends that Respondent should be assessed civil penalties. The Division has the burden of proving the allegations by a preponderance of the evidence. See ORS 183.450(2) and (5); *Cook v. Employment Division*, 47 Or App 437 (1980) (the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). As set forth below, the Division has met its burden.

Plumbing activity

The Division contends that Respondent engaged in plumbing activity. I agree.

ORS 447.010(6) provides:

“Plumbing” is the art of installing, altering or repairing in or adjacent to or serving buildings:

(a) Pipes, fixtures and other apparatus for bringing in the water supply and removing liquid and water-carried waste, including the water supply distributing pipes.

As indicated above, plumbing activity includes installing pipes, fixtures and other apparatus for bringing in the water supply and removing liquid.

In March 2008, Respondent installed a bathtub, hot and cold water fixtures, and drain piping in Ms. Berndt's residence. Accordingly, Respondent engaged in plumbing activity.

Working as a plumbing contractor without a license

The Division contends that Respondent worked as a plumbing contractor without a license. I agree.

ORS 447.040(1) provides:

A person may not work as a plumbing contractor, or advertise or purport to be a plumbing contractor, and a member or employee of a firm, partnership or corporation may not engage in the layout or superintending of plumbing installations, without having obtained the plumbing contractor license required under ORS 447.010 to 447.156 as provided by State Plumbing Board rules adopted under ORS 455.117.

"Licensed plumbing contractor" means a person licensed as required under ORS 447.010 to 447.156 to engage in the business of furnishing labor and material, or labor only, to install, alter and repair plumbing. ORS 693.010(4).

In March 2008, Respondent provided labor and materials to install a bathtub, hot and cold water fixtures, and drain piping in Ms. Berndt's residence. Respondent also charged Ms. Berndt for the cost of the labor and materials. As such, Respondent worked as a plumbing contractor. However, Respondent did not have a plumbing contractor's license. Therefore, Respondent violated ORS 447.040(1).

Respondent argued that he thought he was an employee of CPS and was an apprentice plumber under Mr. Schabeck. However, Respondent did not receive any documentation from CPS that indicated he was an employee. In addition, Respondent did not apply for and was not registered for any apprenticeship program in Oregon. Therefore, Respondent's argument is unpersuasive.

Making plumbing installations without a journeyman plumber license

The Division contends that Respondent made plumbing installations without a journeyman plumber license. I agree.

ORS 693.030(1) provides:

A person may not engage in the trade of journeyman plumber without a journeyman plumber license issued under this chapter.

The trade of a journeyman plumber, by reasonable inference, is the plumbing trade. By

engaging in plumbing activity, an individual is engaging in the journeyman plumber trade.

“Journeyman plumber” means any person holding a valid journeyman plumber license issued under this chapter. ORS 693.010(4).

In March 2008, Respondent made plumbing installations in Ms. Berndt’s residence. By doing so, Respondent engaged in the trade of journeyman plumber. However, Respondent did not have a journeyman plumber license. Therefore, Respondent violated ORS 693.030(1).

Making plumbing installations without first obtaining a plumbing permit

The Department contends that Respondent made plumbing installations without first obtaining a plumbing permit. I agree.

OAR 918-785-0200 provides, in material part:

(1) Permits Required:

(a) No person, firm, or corporation shall do plumbing or effective October 1, 2001, medical gas systems work in the State of Oregon without first obtaining a plumbing permit or minor label when required and paying the appropriate fees to the authorized permit issuing agency[.]

As stated previously, in March 2008, Respondent made plumbing installations in Ms. Berndt’s home. However, Respondent did not obtain a plumbing permit prior to making the plumbing installation. Consequently, Respondent violated OAR 918-785-0200(1)(a).

Respondent argued that Ms. Berndt obtained a valid plumbing permit. However, plumbing permits are not transferable to an unlicensed person. Thus, Respondent’s argument is unpersuasive.

Accordingly, Respondent worked as a plumbing contractor without having a plumbing contractor’s license; installed plumbing in Ms. Berndt’s residence without having a journeyman plumber license; and installed plumbing in Ms. Berndt’s residence without first obtaining a valid plumbing permit. Therefore, Respondent violated ORS 447.040(1), ORS 693.030(1), and OAR 918-785-0200(1)(a).

Penalty

The Division contends that Respondent should be assessed civil penalties in the amount of \$5,500. Respondent contends that the penalties should be reduced.

ORS 455.895 is titled “Civil penalties” and provides, in material part:

(1)(a) The State Plumbing Division may impose a civil penalty

against a person as provided under ORS 447.992 and 693.992. Amounts recovered under this paragraph are subject to ORS 693.165.

(2) The Director of the Department of Consumer and Business Services, in consultation with the appropriate Division, if any, may impose a civil penalty against any person who violates any provision of *** ORS chapters 447, 460 and 693, or any rule adopted or order issued for the administration and enforcement of those provisions. *** [A] civil penalty imposed under this section must be in an amount determined by the appropriate Division or the director of not more than \$5,000 for each offense or, in the case of a continuing offense, not more than \$1,000 for each day of the offense.

As indicated above, the Division may impose up to a maximum penalty of \$5,000 for each offense. Having reviewed the record, and taking into account that Respondent has no prior violations for unlicensed activities, I believe that civil penalties totaling \$5,500 are appropriate in this matter.

ORDER

I propose the Building Codes Division issue the following order:

The Second Amended Notice of Proposed Assessment of a Civil Penalty and Final Order on Default is AFFIRMED.

Dove L. Gutman

Senior Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: December 17, 2009

APPEAL PROCEDURE

This is the Administrative Law Judge's Proposed Order. You have the right to file written exceptions and argument to be considered per OAR 137-003-0650. Your exceptions and argument must be received within 20 calendar days after the service date of this Proposed Order. Send them to:

Building Codes Division
Manager, Enforcement and Licensing
PO Box 14470
Salem OR 97309-0404

