

**BEFORE THE DIRECTOR  
OF THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
AND THE STATE PLUMBING BOARD  
STATE OF OREGON**

IN THE MATTER OF:

) **FINAL ORDER**

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)

**KEN M. VAN HOESEN**

) OAH Case Nos.: 1403759 and 1403772

) Agency Case No.: 2013-0060

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**HISTORY OF THE CASE**

On May 15, 2014, the State Plumbing Board (Board) of the Building Codes Division (Division) issued an Amended Notice of Proposed Assessment of Civil Penalty and Proposed Revocation of Journeyman Plumber License 5374JP, Final Order on Default to Ken M. Van Hoesen (Respondent). On May 19, 2014, Respondent requested a hearing. On June 26, 2014, the Division referred the hearing request to the Office of Administrative Hearings (OAH).

On July 1, 2014, the Director of the Department of Consumer and Business Services (Director) issued an Order to Cease and Desist to Respondent. On July 10, 2014, Respondent requested a hearing with regard to the order. On July 15, 2014, the Division submitted an updated hearing referral form to OAH and requested that the hearing on the Order to Cease and Desist (OAH case no. 1403772) be consolidated with the hearing in case no. 1403759. The OAH consolidated the two cases and Administrative Law Judge (ALJ) Marni J. Davis was assigned to preside at hearing.

On March 24, 2015, the Board issued a Second Amended Notice of Proposed Assessment of a Civil Penalty & Proposed Revocation of Journeyman Plumber License 5374JP and Final Order on Default.

ALJ Davis held a contested case hearing in Salem, Oregon on May 19, 2015. Respondent appeared by telephone and was represented by attorney Douglas Gallagher, who appeared in-person. Assistant Attorney General Tyler Anderson represented the Division. Homer Humelbaugh, Andrea Simmons and John Adams testified on behalf of the Division. The record closed at the conclusion of the hearing.

ALJ Davis issued a proposed order on July 2, 2015, recommending Respondent pay a \$21,000 civil penalty for seven violations of ORS 447.040(1), recommending that license revocation was not appropriate, and also proposing that that the Division did not establish grounds for the Director to issue the Order to Cease and Desist in this case.

On December 15, 2015, the Board and Division issued an Amended Proposed Order. In that Amended Proposed Order, the Board assessed a \$21,000 civil penalty and the Director withdrew the Order to Cease and Desist.

On January 11, 2016, the Board and Division issued a Second Amended Proposed Order, and on February 17, 2016 reissued that same Second Amended Proposed Order. In that Second Amended Proposed Order, the Board assessed a \$21,000 civil penalty and the Director withdrew the Order to Cease and Desist.

### **ISSUES**

1. Whether Respondent worked as a plumbing contractor, or advertised or purported to be a plumbing contractor, without having a plumbing contractor license, in violation of ORS 447.040(1).
2. Whether the Board may impose a civil penalty of \$28,000 against Respondent. ORS 455.895(1) and OAR 918-001-0036.
3. Whether revocation of Respondent's journeyman plumber's license 5374JP is appropriate. ORS 455.125(2)(a).
4. Whether the Director may order Respondent to cease and desist from engaging in any violation of the state building code. ORS 455.775(2).

### **EVIDENTIARY RULINGS**

Exhibits A1 through A15, offered by the Division, were admitted into the record without objection. Exhibits R1 through R9, offered by Respondent, were also admitted into the record without objection.

### **STIPULATED FINDINGS OF FACT**

1. During all relevant times, Respondent was a licensed Oregon journeyman plumber, holding license number 5374JP.
2. At no relevant time did Respondent hold a valid Construction Contractors Board (CCB) license.
3. During or about the period of July 31, 2012, through April 18, 2013, Respondent performed work as a plumbing contractor, using invoices with the name of "Ken Van Hoesen/Lakeview Plumbing" printed on the invoices, and using CCB number 177122 on the same invoices.
4. CCB license number 177122 is held by Gary McCleese & Sons Inc.
5. At no relevant time did Respondent hold a valid Oregon plumbing contractor license.

6. On or about June 17, 2011, Respondent replaced a 20-foot section of a basement sewer line, for the account of Lake County, for which the county paid Respondent \$300.

7. On or about July 26, 2011, Respondent “[dug] up a sprinkler valve and adjust[ed] [it] at LKV shop” for the account of Lake County, for which Respondent received \$112.50.

8. On or about August 11, 2011, Respondent reconnected a “shower drain” for the account of Lake County, for which Respondent received \$113.34.

9. On or about August 30, 2011, Respondent repaired a museum toilet for the account of Lake County, for which Respondent received \$35.

10. On or about September 7, 2011, Respondent installed a “CH-Sloan valve” in a women’s restroom for the account of Lake County, for which Respondent received \$65.

11. On or about June 2, 2012, Respondent accepted a \$10,880 advance payment for the installation of 34 toilets for the account of the Freemont Inn, 524 N. G Street, Lakeview, Oregon.

12. On or about August 6, 2012, on invoice letterhead for “Ken Van Hoesen/Lakeview Plumbing”, a handwritten note followed by Ken Van Hoesen’s signature read as follows:

To whom it may concern, [t]here has been an issue with American Standard & my wholesaler Budge-McHugh in Medford about shipping. I have been in contact with Budge McHugh this morning 8-6-12, was told toilets will be delivered in Medford this week. I am going to Reno for hot August Nites car show this week. I will pick toilets up next week and install them as soon as I get them here. Sorry if I have caused any inconveniences. If you have any questions please feel free to call me.

13. On or about September 6, 2012, check #333 to Budge McHugh was made out from Ken Van Hoesen for \$2,622.36 for toilets, orders #112969, 110442.

14. On or about November 2, 2012, Respondent invoiced Lake County for work he performed at the Lake County Jail, where Respondent replaced a wax ring on a toilet and repaired a broken pipe adaptor for a sink drain, for the account of Lake County, and for which he invoiced the County \$317.15.

15. The Division previously disciplined Respondent in BCD case number 2010-0071, wherein Respondent’s journeyman plumber’s license number 5374JP was suspended for failure to pay civil penalties owed as a result of the final order in case number 2005-0308.

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## **FINDINGS OF FACT**

1. Respondent has worked as a journeyman plumber for almost forty years. (Test. of Respondent.)
2. On March 15, 2006, the Board issued a final order in case no. 2005-0308, ordering Respondent to pay penalties totaling \$1,250. The Board assessed Respondent a penalty because he allowed an individual to perform a plumbing installation without having a valid journeyman plumber's license. (Ex. A2.)
3. On April 15, 2010, the Board issued a final order in case no. 2010-0071, suspending Respondent's journeyman plumber's license #5374JP because he failed to pay the penalty in case no. 2005-0308. (Ex. A2.)
4. On May 10, 2010, Respondent's journeyman plumber's license was reinstated. (Ex. A9.)
5. In approximately 2011, Gary McCleese & Sons Inc. obtained a plumbing contractor's license to allow Respondent to work as a journeyman plumber. (Test. of Respondent.)
6. On June 14, 2013, Tony Guidone, an enforcement officer with the Division, informed Respondent that he was violating state building code by using Gary McCleese & Sons Inc.'s CCB number. Respondent stated he was not aware that he was violating any statutes or laws prior to this conversation. (Ex. A9 at 2; test. of Respondent.)
7. Replacing a 20-foot section of sewer line, digging up a sprinkler valve and adjusting it, reconnecting a shower drain, repairing a toilet, installing a "CH-Sloan valve," replacing a wax ring on a toilet and repairing a broken pipe adaptor for a sink drain are plumbing installations, as defined in ORS 447.010(6). (Ex. A9 at 4.)
8. The Board based the proposed penalty in this case on the factors set forth in the Board's penalty matrix. (Ex. A3; test. of Simmons.)

## **CONCLUSIONS OF LAW**

1. Respondent engaged in the business of working as a plumbing contractor or advertising or purporting to be a plumbing contractor without a plumbing contractor license, in violation of ORS 447.040(1).
2. The Division may impose a civil penalty of \$21,000 against Respondent.
3. Revocation of Respondent's journeyman plumber's license 5374JP is not appropriate.
4. It is not necessary for the Director to order Respondent to cease and desist from engaging in any violation of the state building code.

## OPINION

The Board and Director proposed that Respondent advertised or purported to be a plumbing contractor, without a plumbing contractor's license. The Board also proposed that Respondent should be assessed a \$28,000 civil penalty for the violations and that his journeyman plumber's license should be revoked. The Director also proposed that the Respondent should be ordered to cease and desist from engaging in any further violation of the state building code. The Board and Director had the burden to show, by a preponderance of the evidence, that Respondent committed the alleged violations. ORS 183.450(2), *Harris v. SAIF*, 292 Or 683, 690 (1982). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or. 390 (1987).

### *Engaging in the Business of Working as a Plumbing Contractor or Advertising or Purporting to be a Plumbing Contractor without a Plumbing Contractor License*

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.
  - (b) Fixtures and fixture traps.
  - (c) Soil, waste and vent pipes.
  - (d) House drain and house sewer to the sewer service lateral at the curb, or in the street, or alley, or other disposal terminal holding human or domestic sewage.
  - (e) Storm water drainage, with their devices, appurtenances and connections.
- Pipes, fixtures and other apparatus for medical gas, anesthetic waste gas and vacuum systems.

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 plumber contractor license under ORS 447.010 to 447.156 as provided by State Plumbing Board rules adopted under ORS 455.117.

The parties stipulated that Respondent made plumbing installations, that he did not have a plumbing contractor license when he made those plumbing installations and that he received payment for making the plumbing installations. Respondent used the CCB license number 177122, held by Gary McCleese and Sons Inc., on his invoices for the installations. Because he

agreed to perform this work and received payment for the work, the preponderance of the evidence indicates that he purported to be acting as a plumbing contractor. Thus, he engaged in the business of working as a plumbing contractor without a plumbing contractor license, in violation of ORS 447.040(1).

### *Civil Penalties*

The Board and Director, through the Department of Consumer and Business Services Building Codes Division have adopted administrative rules to administer and enforce ORS chapter 693. OAR 918-001-0036(6) provides that the Director may, subject to approval of the Boards, develop a penalty matrix for the Boards to use as a guideline for assessing civil penalties.

At hearing, the Board argued that Respondent should be assessed a penalty in this case for seven violations. Additionally, the Board argued that Respondent should be considered a second time violator because his journeyman plumber's license was suspended within the last five years, in 2010. While Respondent's journeyman plumber's license was suspended in 2010, that suspension was based on the non-payment of a penalty assessed in 2006 when Respondent violated a provision of state building code and the violations in the current case were not related to failure to pay a civil penalty. No evidence was presented to establish that Respondent had any state building code violations of the same type at issue here, within a five-year period of May 15, 2014, when the Amended Notice of Proposed Assessment of a Civil Penalty in this case was issued by the Board. Therefore, the \$28,000 civil penalty proposed by the Board is not appropriate.

Respondent argued that he should only be assessed a \$6,000 penalty. Respondent testified that he has two children in college and he can reasonably pay a \$6,000 penalty. While Respondent may have significant financial obligations, \$6,000 is not an appropriate civil penalty when Respondent violated ORS 447.040(1) on at least seven occasions in 2011 and 2012, nor is it appropriate under the Board's established matrix.

Respondent should, however, be assessed a penalty as a first time violator, and not as a second time violator. The Division's penalty matrix proposes a \$3,000 penalty for each violation when an individual engages in the business or of a contractor working in a trade that requires a specialty license. Thus, Respondent should be assessed a civil penalty of \$3,000 for each violation, for a total of \$21,000, for violating ORS 447.040(1).

### *Revocation of Respondent's Journeyman Plumber's License:*

ORS 455.125(2) provides in relevant part:

In addition to any other sanction, remedy or penalty provided by law, the Director of the Department of Consumer and Business Services or an appropriate advisory board may deny, suspend, condition or revoke a \* \* \* license or other authority of a person to perform work or conduct business issued under laws administered by



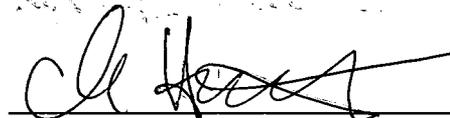
**ORDER**

The State Plumbing Board and the Director issue the following order:

Ken M. Van Hoesen shall pay a \$21,000 civil penalty for violations of ORS 447.040(1) and the Director's Cease and Desist Order is withdrawn.

  
\_\_\_\_\_ for  
Chair  
State Plumbing Board  
State of Oregon

Dated this 16 day of March, 2016.

  
\_\_\_\_\_ for  
Director  
Department of Consumer and Business Services  
State of Oregon

Dated this 22 day of March, 2016.

**APPEAL NOTICE**

You are entitled to judicial review of this order in accordance with ORS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon within 60 days from the date of service of this order.