

1 **BEFORE THE STATE PLUMBING BOARD OF THE STATE OF OREGON**

2 **IN THE MATTER OF:**

)
) **FINAL ORDER**

3 **BRAD W. FIELD, AN INDIVIDUAL**

)
) **OAH CASE NO. 1403602**

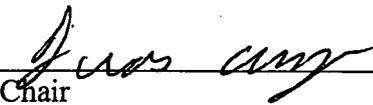
)
) **BCD CASE NO. C2013-0255**

4
5 **RESPONDENT**
)

6 After consideration of Respondent's written exceptions, filed July 3, 2014, the State Plumbing
7 Board of the State of Oregon finds the exceptions to be without merit.

8 The board adopts and incorporates by reference the attached proposed order, dated June 13,
9 2014, disciplining Respondent for violating Oregon Revised Statutes (ORS) 693.030(1).

10
11 Dated this 21 day of August, 2014

12
13 
14 _____
Chair
15 State Plumbing Board
State of Oregon

16
17 **NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW (OREGON COURT OF APPEALS)**

18 Respondent is entitled to judicial review of this Final Order pursuant to ORS 183.482. Judicial
19 review may be initiated by filing a petition for review with the Oregon Court of Appeals within sixty
20 (60) days from the date this Final Order was mailed to Respondent.

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

IN THE MATTER OF:)	PROPOSED ORDER
)	
BRAD W. FIELD , an individual)	OAH Case No.: 1403602
)	Agency Case No.: C2013-0255
Respondent)	

HISTORY OF THE CASE

On January 22, 2014, the Building Codes Division (BCD) issued a Notice of Proposed Assessment of a Civil Penalty and Final Order on Default to Brad W. Field (Respondent) for performing plumbing work without a journeyman plumbing license, and proposing to assess a civil penalty in the amount of \$2,000. On February 10, 2014, Respondent requested a hearing. On February 27, 2014, BCD referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned the matter to Administrative Law Judge (ALJ) Christopher Dorr.

The OAH mailed a Notice of Hearing to the parties on March 28, 2014. ALJ Dorr held a telephone hearing on May 5, 2014. Respondent appeared without counsel and testified on his own behalf. Rory Shelby of McLane Plumbing and Marty Ruble of CSI Construction testified for Respondent. John Adams appeared as authorized representative for BCD. James Brien of the City of Warrenton, BCD Enforcement Officer Mark Rodriguez and Assistant Chief Plumbing Inspector Homer Humelbaugh testified for BCD. The record closed at the conclusion of the hearing on May 5, 2014.

ISSUES

(1) Whether Respondent engaged in plumbing as defined in without a journeyman plumbing license. Oregon Revised Statute (ORS) 447.010(6), 693.030(1)

(2) Whether BCD may impose a civil penalty of \$2,000 for violation of ORS 693.030(1). ORS 455.895(1)(a) and (2).

EVIDENTIARY RULING

BCD Exhibits A1 through A5 were admitted into evidence without objection.

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BUILDING CODES

FINDINGS OF FACT

1. At all material times, Respondent was employed by McLane Plumbing as a laborer. Respondent does not hold any plumbing licenses in the State of Oregon. (Ex. A1; test. of Rodriguez, Fields.)

2. On or about November 25 or 27, 2013, Jim Brien, plumbing inspector for the City of Warrenton, visited the job site where an addition to the Fred Meyer store in Warrenton was under construction. McLane Plumbing was a contractor on the project. From approximately 60 to 70 feet away, Brien observed a Hispanic male in a cowboy hat (Juan) standing on top of the trench. Brien observed Juan “priming” the end of a section of PVC pipe, hand the PVC pipe to an individual in the trench and observed the individual in the trench assemble it to another section of pipe. Brien walked over to the trench where he observed Respondent, in the trench, holding a nut driver.¹ (Ex. A2; test. of Brien.)

3. Brien instructed Respondent to climb out of the trench. Brien asked to see Respondent’s identification, which Respondent provided. Brien also asked to see Juan’s identification. Juan refused. Brien contacted the police and requested an officer be dispatched to the job site. Brien prepared a written report which states:

I witness: William Brad Field was in a ditch connecting waste lines as a laborer. “Was previous [*sic*] warned.” Mr. Field[] was/is employed by McLane Plumbing Co. Mr. Field’s address is: 2667 Kirtland Road, Central Point, OR 97502.

(Ex. A2 at 2.) Brien signed and dated the complaint report on November 27, 2013. (*Id.*)

4. Brien inspected the Warrenton Fred Meyer job site at least 25 times prior to November 25 or 27, 2013. (Test. of Brien.)

5. During one prior inspection, Brien observed Respondent “priming fittings,” a task that requires a journeyman plumbing license. Job foreman Rory Shelby had instructed Respondent to prime the fittings even though he was aware Respondent was not a licensed plumber, and knew the task required a plumbing license. Shelby instructed Respondent to perform this work because he did not want to have to climb out of the trench each time to prime the fittings himself. (Test. of Shelby, Field.) Respondent was not aware this activity constituted the trade of plumbing and required a journeyman plumbing license. (Test. of Field.)

6. During another inspection of the job site Brien observed Respondent holding an “air chuck” on a pressure gauge and was pushing air into a water line. (Test. of Shelby, Brien.) The purpose of pushing air into a water line is to check whether the line is water tight, and constitutes the trade of plumbing, which requires a plumbing license. (Test. of Humelbaugh.) Respondent was not aware this activity constituted the trade of plumbing and required a journeyman plumbing license. (Test. of Field.)

¹ A nut driver is a hand tool used to tighten the nut on a device that holds a connector fitting to the end of a pipe. (Test. of Shelby.)

7. BCD's penalty matrix sets forth a penalty of \$2,000 for a first time violation by an individual working without a license in a specialty trade, like plumbing. (Ex. A5.)

CONCLUSIONS OF LAW

1. Respondent engaged in the activity of plumbing as defined in 447.010(6), without a journeyman plumbing license, in violation of ORS 693.010(1).

2. BCD may impose a \$2,000 civil penalty for a violation of ORS 693.030(1). ORS 444.895(1)(a) and (2).

OPINION

BCD contends that Respondent violated ORS 693.030(1) when he assembled waste water pipes at a job site where an addition to a Fred Meyer store in Warrenton, Oregon was being constructed, and may be assessed a civil penalty of \$2,000. Respondent denies that he engaged in the trade of plumbing.

The Board has the burden of proof in this civil penalty action. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991). In the absence of legislation adopting a different standard, the standard of proof in administrative hearings is preponderance of the evidence. *Cook v. Employment Div.*, 47 Or App 437 (1980). A preponderance of the evidence means that there is sufficient to convince a fact finder that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

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.
- (f) Pipes, fixtures and other apparatus for medical gas, anesthetic waste gas and vacuum systems.

(g) Solar heating and cooling systems.

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.”

BCD contends that Respondent was engaged in the trade of plumbing on or about November 25 or 27, 2013. Respondent does not have a plumbing license. If he was engaged in an activity that constitutes plumbing, it would be a violation of the above statute. BCD presented the testimony of Inspector Brien, who observed Respondent assemble waste water pipe in a trench at the Fred Meyer addition job site. Brien also testified that this was the third time he observed Respondent engaged in the trade of plumbing. On those two prior occasions, Brien warned Respondent, but did not issue citations.

Respondent denied that he was engaged in the trade of plumbing on November 25 or 27, 2013. Respondent and Foreman Shelby testified that Respondent was in the trench searching for a nut driver that Shelby had dropped in the trench.

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness’s credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002). Respondent’s denial in this case is not persuasive.

On two prior inspections of the job site, Brien observed Respondent engaged in activities that constituted plumbing. Respondent admitted to those. Foreman Shelby admitted that on one of those occasions he had instructed Respondent to prime pipe sections, which he knew constituted plumbing, and knew or should have known violated the statute. His excuse was that it was that it was inconvenient to climb out of the trench and do the plumbing work himself. Shelby’s attitude regarding this violation was cavalier. It indicated his willingness to engage his laborers in prohibited plumbing work when it suits his needs. Shelby’s testimony that Respondent was not assembling pipe in the trench on this occasion is not credible.

His testimony also cannot corroborate Respondent’s denial because Shelby was not present at the trench when Brien made his observations. Juan, the only other witness who was present at the trench, did not testify at the hearing. Ruble, the other witness who testified for Respondent, was also not present at the trench. He admitted he was not present and admitted

that he did not observe what Respondent was doing in the trench at the time he was observed by Brien.

In the circumstances of this case, Respondent's denial is not sufficient to overcome BCD's evidence of a violation. In contrast, inspector Brien's testimony was detailed and consistent. It was supported by admissions of prior violations by Respondent and Shelby, and is bolstered by Foreman Shelby's willingness engage his employees to perform unlicensed plumbing work when it serves his needs. Brien could have cited Respondent for the previous two violations Respondent admitted to. Under those circumstances, Brien would have no reason to draft a report citing Respondent for a violation when there was none.

BCD presented sufficient evidence to demonstrate Respondent engaged in the trade of plumbing without a journeyman plumbing license in violation of ORS 693.030(1). ORS 455.895(1)(a) and (2)² authorizes BCD to impose a civil penalty up to \$5,000 for the violation that occurred in this case. BCD has chosen to impose a penalty of \$2,000, which is consistent with the Advisory Board's June 2010 penalty matrix, for a first time violation.

ORDER

I propose the Building Codes Division issue the following order:

Respondent is assessed a civil penalty of \$2,000 for engaging in the trade of plumbing without a journeyman plumbing license, in violation of ORS 693.030(1).

Christopher C. Dorr

Administrative Law Judge
Office of Administrative Hearings

² The Department of Consumer and Business Services, or an appropriate advisory board, if any, may at its discretion impose a civil penalty against any person who violates the state building code or * * * or ORS chapter * * * 693, or any rule adopted or order issued for the administration and enforcement of those statutes. Except as provided in subsections (3), (4) and (9) of this section or ORS 446.995, a civil penalty imposed under this section must be in an amount determined by the appropriate advisory board or the department 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.

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

CERTIFICATE OF MAILING

On June 13, 2014, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1403602.

By: First Class Mail

Brad Field
2667 Kirtland Rd
Central Point OR 97502

John Adams
Building Codes Division
PO Box 14470
Salem OR 97309-0404

Ryan Clark
Administrative Specialist
Hearing Coordinator