

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD,)
)
Petitioner,)
)
vs.) Case No. 03-1993PL
)
MIKE H. KARGAR,)
)
Respondent.)
-----)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on July 18, 2003, by video teleconference in Tallahassee and Daytona Beach, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Brian A. Higgins, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Barry E. Hughes, Esquire
2001 South Ridgewood Avenue
South Daytona, Florida 32119

STATEMENT OF THE ISSUE

At issue is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty

should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Department), filed an Administrative Complaint on June 7, 2002, which contained four counts of professional violations against Respondent, Mike H. Kargar. Specifically, the Department charged Respondent with violations of Subsections 489.129(1)(f), (i) and (m), Florida Statutes, by acting in the capacity of a contractor under a certificate or registration issued except in the name of the certificate-holder or registrant as set forth on an issued certificate or registration; by failing to include in a contract a written statement explaining the consumer's rights under the Construction Industries Recovery Fund as required by Section 489.1425, Florida Statutes; by failing to apply for a certificate of authority through a qualifying agent and under a fictitious name as required by Section 489.119(2), Florida Statutes; and by committing incompetency or misconduct in the practice of contracting.

Respondent disputed the allegations of the Administrative Complaint and requested an administrative hearing. The case was referred to the Division of Administrative Hearings on or

about May 28, 2003. A formal hearing was set for July 18, 2003.

At hearing, Petitioner presented the testimony of Scott Steger and Richard Kushner. Petitioner's Exhibits numbered 1 through 9 were admitted into evidence.

Respondent presented the testimony of Robert Fleming and testified on his own behalf. Respondent's Exhibits numbered 2 through 4 were admitted into evidence.¹⁷

A Transcript, consisting of one volume, was filed on July 31, 2003. On August 11, 2003, the parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All citations are to Florida Statutes (1999) unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, the Department, is the state agency charged with the duty and responsibility of regulating the practice of contracting pursuant to Chapters 20, 455 and 489.

2. At all times material to the allegations of the Administrative Complaint, Mike H. Kargar, d/b/a Kargar Construction, Inc., was licensed as a Florida State Certified Building Contractor and a Florida State Certified Pool/Spa Contractor, having been issued license numbers CBC 37867 and CPC 52530 respectively. His licensure status for each license is designated as "Current, Active."

3. The Department's records establish that at no time material hereto did Kargar Construction apply for or obtain a Certificate of Authority as a Contractor Qualified Business in the State of Florida.

4. On or about July 14, 1999, Respondent, doing business as Premier Pools, entered into a contract with Ronald and Gina Steger (the Stegers) for construction of a residential swimming pool to be located at 466 Champagne Circle, Port Orange, Florida. The contract price was \$26,469.00.

5. Respondent was paid in full by the Stegers for the construction of the swimming pool at their residence.

6. While Respondent verbally informed Mr. Steger about the Construction Industries Recovery Fund, the contract does not contain a written statement explaining the consumer's rights under the Construction Industries Recovery Fund.

7. Respondent has constructed thousands of residential pools during his career. Respondent proceeded with the construction of the Stegers' pool in the same manner as with all other pools he constructed. That is, he reviewed the contract documents, visited the job site to inspect the site during the various stages of construction, and was in charge of scheduling. As is his typical practice, Respondent also had superintendents who oversaw the project and subcontractors

who performed most of the actual work on the excavation and construction of the pool.

8. Respondent visited the Stegers' job site at least twice. He went to the pool site before the pool was "shot." During that visit, he did not observe anything that raised concerns regarding the soil conditions that existed at the Steger residence. He inspected the Stegers' job site after the shell was poured and did not observe any problems. He also observed the control joints for the concrete for the pool deck. The spacing of the control joints at the Stegers' job site was the same as his company usually utilizes in constructing pool decks.

9. Robert Fleming is the owner/operator of Fleming Excavating, which is in the business of excavating for swimming pools. He has been in the business of excavating pools for about ten years and has excavated between 5,000 and 6,000 pools. He and persons who work for him performed the excavation of the Stegers' pool.

10. As is typical on a pool excavation job, Mr. Fleming performed what he refers to as "LDS" on the Stegers' pool. That is, layout, dig, steel, and be ready for inspection. He staked out the pool, determining its shape, then excavated the dirt. After the dirt was excavated, he and his workers put in the steel for inspection.

11. In digging the Stegers' pool, Mr. Fleming did not encounter any unusual subsurface soil conditions to give him any indication that there would be problems for the pool in the future.

12. About two weeks after the project was completed, Mr. Steger observed what he perceived to be a half inch rotation of the pool shell in the ground. When the pool was initially filled with water, the water level followed the grout line of the tile around the pool. After a couple of weeks, the water level against the pool tile furthest from the home was at a different level than the tile toward the area of the pool closest to the home. This was reported to Respondent. Mr. Steger then noticed a crack in the pool deck on the backside of the pool. He described the shape of the initial crack to be the same shape as the backside of the pool shell in the decking. Other cracks formed. One is evident where pieces of tile around the pool shell have come off at the place where the crack in the pool deck meets the pool shell. The cracking is all on the deck, not in the pool itself.

13. A representative of Respondent's company went to the Stegers' home in March of 2000 and documented on a warranty form as follows:

Southwest deck, [less than] 1/32 separation around the perimeter south of beam. Northwest near expansion tile needs to be regrout. Watch for further expansion northeast. Near expansion tile needs to be regrout. Watch for further expansion.

14. Between December 1999 and March 2000, Mr. Steger made two other requests for warranty work. These conditions were corrected by Respondent and signed off as satisfactorily completed by Mr. Steger.

15. Sometime in the year 2000, Respondent became aware of the cracking problems in the Stegers' deck. He went to the Stegers' home and met with Mr. Steger. He observed that the cracks were in a circular type of pattern following the pool shape.

16. Respondent offered to repair the deck cracks by "v-ing" out the cracks and inserting a urethane 500 product to stop the cracks from coming through. Once that process was completed, Respondent proposed that he would then "respray and re-acrylic the affected area of the deck." Respondent has used this process numerous times to cover cracks in decks, and once it is used, the cracks do not show.

17. Mr. Steger did not agree to Respondent's proposal to repair the cracking of the deck area as illustrated by his testimony at hearing:

Mr. Kargar came out and told me that he would, in fact, grind out the concrete in

the cracks themselves, fill them in with some sort of epoxy substance in order to mask the cracking. However, that does not address the original problem of the pool shell shifting and the deck moving away from the pool. So, no, I did not accept that as a solution to the problem.

18. Richard Kushner is a civil engineer with a concentration in geotechnical engineering and construction engineering. He works for Universal Engineering Science (Universal). Mr. Steger called Universal which conducted an investigation as to why the pool deck was cracking.

19. A field representative from Universal went to the Stegers' home and performed four manual auger borings into the soil to test the type and condition of the soil under the pool deck, ran density and compaction tests to see how tight the soils were underneath the pool deck, and observed the cracking and the cracking patterns in the concrete. Mr. Kushner did not personally go to the Stegers' as it is customary in the field of geotechnical and construction engineering to review data, do whatever analysis is necessary, and come to a conclusion using an investigative report.

20. Regarding the cause of the pool deck cracking, Mr. Kushner had three concerns: the compaction of the soil underneath the concrete slab was less than 90 percent, whereas the industry standard is 95 percent; evidence of wood rot was found at one of the auger borings, indicating that the

original soils were not well stripped and cleared of debris, such as sticks and roots; and insufficient spacing of control joints in the concrete. Mr. Kushner concluded that the contractor and subcontractors who constructed the pool deck were responsible for the cracking in the pool deck.

21. Mr. Kushner acknowledged that two of the three concerns, i.e., the soil compaction and the evidence of organic debris, are circumstances that may cause future problems but were not the cause of the current problems with the deck cracking.

22. Mr. Kushner also acknowledged that the pool cracking is a problem which is cosmetic or aesthetic in nature and that the cracks in the pool deck are not structural problems.

23. Universal's investigation and Mr. Kushner's report relate exclusively to the pool deck, not to the pool shell or the subsoil conditions under the pool shell. Mr. Kushner was not aware when he wrote the report relied upon by Petitioner that there was an issue regarding whether the pool shell was shifting; was not involved in any discussions about the pool shell; and was not aware that the cracks in the pool deck follow the shape of the pool.

24. Mr. Kushner acknowledged that any shifting of the pool shell could be caused by soil conditions underneath the

pool shell and could be the cause of deck cracking that followed the shape of the pool. However, the investigation conducted by Universal and his report were exclusively related to the cracking of the pool deck and did not examine anything regarding the pool shell itself.

25. As of July 18, 2003, the Department's costs of investigation and prosecution, excluding legal costs, totaled \$384.63.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes (2002).

27. Petitioner has the burden of proving by clear and convincing evidence the specific allegations of the Administrative Complaint. See *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996).

28. The clear and convincing standard has been described as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the

evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established.

Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, fn. 5 (Fla. 1st DCA 1989) quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

29. Section 489.129(1) reads in pertinent part as follows:

(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

* * *

(f) Acting in the capacity of a contractor under any certificate or registration

issued hereunder except in the name of the certificateholder or registrant as set forth on the issued certificate or registration, or in accordance with the personnel of the certificateholder or registrant as set forth in the application for the certificate or registration, or as later changed as provided in this part.

* * *

(i) Failing in any material respect to comply with the provisions of this part or violating a rule or lawful order of the board.

(m) Committing incompetency or misconduct in the practice of contracting.

30. Section 489.119 reads in pertinent part as follows:

489.119 Business organizations; qualifying agents.--

* * *

(2) If the applicant proposes to engage in contracting as a business organization, including any partnership, corporation, business trust, or other legal entity, or in any name other than the applicant's legal name or a fictitious name where the applicant is doing business as a sole proprietorship, the business organization must apply for a certificate of authority through a qualifying agent and under the fictitious name, if any.

* * *

(6)(e) The board shall issue a notice of noncompliance for the first offense, and may assess a fine or issue a citation for failure to correct the offense within 30 days or for any subsequent offense, to any contractor or business organization that fails to include the certification,

registration, or certificate of authority number as required by this part when submitting an advertisement for publication, broadcast, or printing or fails to display the certification, registration, or certificate of authority number as required by this part.

31. Section 489.1425 reads in pertinent part as follows:

489.1425 Duty of contractor to notify residential property owner of recovery fund.--

(1) Any agreement or contract for repair, restoration, improvement, or construction to residential real property must contain a written statement explaining the consumer's rights under the Construction Industries Recovery Fund, except where the value of all labor and materials does not exceed \$2,500. . . .

* * *

(2) (a) Upon findings a first violation of subsection (1), the board may fine the contractor up to \$500, and the moneys must be deposited into the Construction Industries Recovery Fund.

32. The contract entered into between Respondent and the Stegers reads in pertinent part as follows:

(8) LIMITED WARRANTY: Contractor agrees to substantially complete the work contracted for in a workmanlike manner. Any warranty hereinafter described is strictly limited in the manner set forth. . . .

(A) LIMITED STRUCTURAL WARRANTY: The pool structural shell is warranted not to leak due to cracking for a lifetime, so long as the original owner resides at the place of

construction. This limited structural warranty does not extend to or cover any loss or damage to the pool shell due to lack of maintenance, soil conditions, soil settlement, damage due to or caused in whole or in part by other construction at the site or in the area, or an Act of God or natural phenomenon. . . .

* * *

(C) LIMITED EQUIPMENT AND MATERIAL INSTALLATION WARRANTY: Contractor warrants the tile, electrical and plumbing installation and any appurtenant structures or equipment pursuant to the Contract to be free from defects in material or workmanship under normal use and service for a period of two (2) years from date of original chlorinating of the pool; . . . Contractor warrants the pool deck slab to be free from defects of material and workmanship and bondage under normal use and service for two (2) years from the date of initial chlorinating of the pool. Owner understands that the pool slab will crack due to settling and/or weather changes. Contractor does not warrant either expressly or impliedly any cracks in the pool slab of one quarter (1/4") inch width or less so long as no substantial disparity of elevation exists and then only in the event of defects in material or workmanship. This limited warranty does not extend to or cover any loss or damage due to or caused in whole or in part by lack of maintenance, soil conditions, soil settlement, other construction at the site or in the area, or any Act of God or natural phenomenon.

33. The Administrative Complaint charges Respondent with violating Section 489.129(1)(f) by acting in the capacity of a contractor under any certificate or registration except in the

name of the certificate holder or registrant as set forth on the issued certificate or registration. As Respondent was licensed as Mike H. Kargar, d/b/a Kargar Construction Inc., and yet acted in the capacity of a contractor through Premier Pools, Petitioner met its burden that Respondent violated this provision.

34. The Administrative Complaint charges Respondent with violating Section 489.129(1)(i) by failing in any material respect to comply with the applicable statutes and rules by failing to apply for a certificate of authority through a qualifying agent and under a fictitious name as required by Section 489.119(2). As Respondent did not apply for a certificate of authority through a qualifying agent, Petitioner met its burden that Respondent violated this provision.

35. The Administrative Complaint charges Respondent with violating Section 489.129(1)(i) by failing in any material respect to comply with applicable statutes and rules by failing to include in the contract with the Stegers a written statement explaining the consumer's rights under the Construction Industries Recovery Fund as required by Section 489.1425. Respondent did not include any such written statement in the contract with the Stegers. Petitioner's oral statement to Mr. Steger gave the Stegers actual notice of this

provision but does not comply with the statute's requirement. Accordingly, Petitioner has met its burden that Respondent violated this provision.

36. The Administrative Complaint charges Respondent with violating Section 489.129(1)(m) by committing incompetency or misconduct in the practice of contracting. Petitioner has not met its burden of proof regarding this charge. The evidence presented does not clearly and convincingly establish that the cracking of the pool deck was due to incompetency or misconduct of Respondent. The complainant firmly believes that the pool shell shifted. Petitioner's expert witness did not undertake any examination of whether or not the pool shell shifted and acknowledged that any such shifting could have resulted in the pool deck cracking. Moreover, Respondent proposed a method of repairing the deck as contemplated in paragraph 8 of the contract, but this proposal was rejected.

37. Regarding Respondent's failure to apply for a certificate of authority, Section 489.119(6) specifies that the board shall issue a notice of noncompliance for the first offense, and may assess a fine or issue a citation for failure to correct the offense within 30 days. Accordingly, this appearing from the record to be Respondent's first offense, the only appropriate penalty is the issuance of a notice of noncompliance by the Construction Industry Licensing Board.

38. Section 489.1425(2) specifies that upon finding a first violation of failure to include a written statement explaining

the consumer's rights under the Construction Industries Recovery Fund, the Board may fine the contractor up to \$500.00. Rule 61G4-17.001(10)(j), Florida Administrative Code, specifies a range of \$100.00 to \$500.00 for a first offense. Rule 61G4-17.002, Florida Administrative Code, allows for consideration of mitigating circumstances. Respondent's oral representation to Mr. Steger regarding the Construction Industries Recovery Fund constitutes mitigation. Accordingly, a fine of \$100.00 is appropriate in this instance.

39. Rule 61G4-17.001(7), Florida Administrative Code, specifies the penalty range for a repeat violation of failure to qualify a firm and/or acting under a name not on the license is \$750.00 to \$1,5000.00 fine. However, the rule does not reference any penalty for a first violation. There being no evidence in the record of any other previous violation, imposition of a fine is inappropriate here.

40. The Department seeks probation for five years, imposition of fines in the total amount of \$3,000.00, and

restitution. As the charge of incompetency or misconduct was not proven, any term of probation is not warranted from the offenses that were proven. The fines sought by the Department are not supported by the applicable statutes and rules. As to restitution, there is no evidence in the record that the Stegers have paid any moneys to another pool company for repairs.^{2/}

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Construction Industry Licensing Board enter a final order imposing a \$100.00 fine to be deposited in the Construction Industries Recovery Fund for a violation of Section 489.1425, issue a notice of noncompliance pursuant to Section 489.119(6)(e), and require Respondent to pay \$384.63 in costs of investigation and prosecution.

DONE AND ENTERED this 22nd day of August, 2003, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2003.

ENDNOTES

^{1/} Respondent's Exhibit numbered 1 was marked for identification but not offered into evidence.

^{2/} The Department's Exhibit numbered 8 regarding a proposal for repairs by another pool company was admitted into evidence pursuant to Section 120.569(2)(g). However, it is hearsay and is not sufficient in itself to support a finding of fact as contemplated by Section 120.57(1)(c).

COPIES FURNISHED:

Brian A. Higgins, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Barry E. Hughes, Esquire
2001 South Ridgewood Avenue
South Daytona, Florida 32119

Robert Crabill, Executive Director
Construction Industry Licensing Board
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Hardy L. Roberts, III, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.