STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, CONSTRUCTION INDUSTRY LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 04-4040
MICHAEL A. CRANE, d/b/a ACCENT BUILDERS OF FLORIDA, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 1 through 3, 2005, in New Smyrna Beach, Florida.

APPEARANCES

For Petitioner: Charles J. Pellegrini, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Daniel J. Webster, Esquire
Daniel J. Webster, P.A.
149 South Ridgewood Avenue, Suite 500
Daytona Beach, Florida 32114-4365

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent has violated Section 489.129(1)(g)1., Florida Statutes, by committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer; and whether Respondent has violated Section 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, issued an Administrative Complaint against Respondent, Michael A. Crane d/b/a Accent Builders of Florida, Inc., on May 18, 2004. The Administrative Complaint alleges that Respondent entered into a contractual agreement with Mr. Rick Moses on or about July 12, 2001, for the construction of an addition to the Moses residence at 839 East 23rd Avenue, New Smyrna Beach, Florida.

On March 21, 2003, Mr. Moses filed a consumer complaint with Petitioner against Respondent. The complaint raised three issues: that Respondent violated Section 489.129(1)(m), Florida Statutes, by committing incompetency or misconduct in the practice of contracting that caused financial harm to a customer; that Respondent violated Section 489.129(1)(g)1., Florida Statutes, by committing mismanagement or misconduct in the practice of contracting that caused financial harm to a

customer when valid liens have been recorded against the property of a contractor's customer, but had not been removed or satisfied in compliance with the law; and that Respondent violated Section 489.129(1)(i), Florida Statutes, by failing to comply with the law or a rule of the Board by failing to obtain a Certificate of Authority for Accent Builders of Florida, Inc.

Respondent disputed the allegations of the Administrative Complaint and requested a formal administrative hearing. The case was referred to the Division of Administrative Hearings and a formal hearing was held on March 1 through 3, 2005.

At the hearing, Petitioner presented the testimony of Terry Bachi, Michael Brinsley, Mark R. Stroup, David Baxter, Tom Bennett, who was accepted as an expert in building structure and water intrusion analyses, Shawn Ferris, who was accepted as an expert in water intrusion analyses, Peter J. Coltune, who was accepted as an expert in general contracting, Jeff Kabool, Rick Moses, and Scott Sherill; and offered Exhibit Nos. 1 through 4A, 7, 9 through 13, 15 through 17, 19 through 21, 22A through G, 23 through 25A, and 27 through 34 into evidence. Respondent presented the testimony of John Bailes, who was accepted as an expert in professional engineering, Michael Crane, and Allen Green, who was accepted as an expert in general contracting and roofing contracting with expertise in water defects; and offered Exhibit Nos. 2 through 13, 28 and 29,

33 and 34, 37, 40, 43, 46 through 48, 50, 62, 66 through 70, 73 and 74, 77 and 78, and 85 and 86 into evidence.

A Transcript was filed on March 31, 2005. Petitioner filed Proposed Findings of Fact and Conclusions of Law on April 15, 2005. Respondent filed Proposed Findings of Fact and Conclusions of Law, as well as a Written Closing Argument on April 20, 2005, along with a Motion for Enlargement of Time to make his post-hearing submittals. That motion was granted and both Petitioner's and Respondent's submittals have been considered.

References are to Florida Statutes (2004), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of contracting pursuant to Section 20.165, and Chapters 455 and 489.

2. Respondent is, and at all times material to these proceedings, has been a Certified General Contractor, in the State of Florida, having been issued License No. CG C8644.

3. Respondent is the Qualifying Agent for Accent Builders of Florida, Inc.

4. On July 12, 2001, Accent Builders of Florida, Inc. ("Accent"), contracted with Rick and Barbara Moses to construct

an addition at their home located at 839 East 23rd Avenue, New Smyrna Beach, Florida, for a base contract price of $131,286.

5. On September 26, 2001, the City of New Smyrna Beach issued Accent Permit No. 37516 for construction at the Moses home.

6. On February 14, 2003, the City of New Smyrna Beach issued a Certificate of Occupancy for the Moses home.

7. Accent Builders of Florida, Inc., obtained a Certificate of Authority in September, 2004. Prior to that time it had no Certificate of Authority even though it had been in business since 1974.

8. During and after construction, Mr. Moses complained to Respondent regarding construction items he believed had been performed improperly, most notably Respondent's failure to repair leaks; failure to install the deck tower in accordance with the manufacturer's instructions; failure to properly install a steam room; and failure to address punch list items. Respondent took repeated measures to attempt to repair the items complained about by Mr. Moses.

9. Mr. and Mrs. Moses paid Respondent a total of $149,432.52.

10. Twice during the period of June 13 through 30, 2002, the Moses observed water intrusion in the second floor master bedroom near the sliding glass doors, as well as in the

southwest corner of the garage below, and in the southeast corner of the first floor spare bedroom. At this time, the drywall and ceilings were not yet in place, but the addition was no longer open to the outside except for the fact that the garage doors had not yet been installed.

11. On June 15, 2002, the Moses observed a hole in the plywood sheathing beneath the roof through which water was intruding. Respondent patched the hole with wood blocks, but the Moses observed that water continued to intrude at that location on June 30, 2002.

12. In early August 2002, Mr. Moses observed intruded water again in the first floor spare bedroom and in the garage. Although the garage doors had still not been installed, the water intrusion was at the southwest corner, well away from the garage door opening. After being informed by the Moses about this problem, Respondent engaged the services of a roofing contractor, Wayne Williams, to make leak repairs in mid-August 2002. Mr. Moses noticed shortly thereafter, on August 20, 2002, that water continued to intrude at the same areas.

13. On August 27, 2002, Respondent installed the drywall, and on September 4, 2002, Mr. Moses observed water running down the wall in the first floor spare bedroom.

14. In October 2002, Mr. Moses again observed intruded water in the garage and the first floor spare bedroom and informed Respondent.

15. In December 2002, Mr. Moses observed water intrusion at the same sites and informed Respondent. At this time, the garage doors had been installed and the addition was fully closed to the outside.

16. On January 1, 2003, Mr. Moses observed water accumulating in the ceiling fan light fixture, on the window sill, on the southeast floor corner beneath the carpet, and showing in the ceiling in the first floor bedroom. Mr. Moses called Respondent, who brought a worker named Hal Copeland to see what Mr. Moses had observed. No work was done that day, but Respondent returned with Mr. Copeland a few days later to seal a joint above between a post and the siding on the deck level, which Respondent believed to be the most likely cause of the leakage.

17. On January 13, 2003, Mr. Moses presented Respondent with a Preliminary Punch List and on January 22, 2003, a Continuation of Punch List. Mr. Moses also provided Respondent with the USPL Carefree Exteriors Decking Systems HDPE Installation & Layout Guidelines with the Preliminary Punch List.

18. After receipt of the Punch Lists, Respondent performed work at the Moses home on the major areas that are relevant to these proceedings, namely, the garage leaks, the spare bedroom leaks, the steam shower, scuttle hole leak, and the second-floor decking.

19. On February 1, 2003, Mr. Moses noticed that neither Respondent nor any of his subcontractors had been on the job for a few days. Mr. Moses counted off 21 days from February 1 when no one appeared at the jobsite to work, then sent a default letter to Respondent, believing Respondent had abandoned the job in violation of the construction contract. Mr. Moses sent the default letter to Respondent on February 25, 2003, believing that Respondent had 10 days to rectify any outstanding issues raised in the default letter.

20. On February 26, 2003, prior to his receipt of the default letter, Respondent called Mr. Moses to tell him that the soap dish was going to be installed in the steam shower on February 27, 2003. That task was performed as scheduled.

21. Also on February 26, 2003, Respondent arranged a meeting with Mr. Moses for March 12, 2003, to go over outstanding items from the punch lists.

22. On March 12, 2003, Respondent, along with Les Ogram, the electrical contractor, and Jim Kamerzel, the tile man, met

with Mr. Moses in the master bedroom. Mr. Moses believed that meeting was to go over punch list items.

23. At the March 12 meeting, Mr. Moses expressed his displeasure with the state of the construction, especially with the placing of a vent in the steam shower and some electrical problems. Mr. Moses was not satisfied with Respondent's responses at the meeting and ordered him from the property.

24. On the same day, March 12, 2003, G & W plumbing showed up at the Moses home to move the steam vents from 12 inches to 18 inches off the floor, but Mr. Moses would not let the plumber perform any work that day.

25. On April 8, 2003, G & W Plumbing filed a claim for lien against the Moses property for an unpaid bill in the amount of $7,361.20. Mr. Moses satisfied the lien through eight payments between April 5 and November 5, 2003, totaling $7,955.20 which reflects the amount due G & W plus attorney's fees.

26. On June 6, 2003, Respondent filed a Contractor's Final Affidavit stating that it had been paid for all work completed, with the exception of the liens by G & W Plumbing in the amount of $7,361.20, Electrical Construction, Inc., in the amount of $2,101.96, and CED Tile, Inc., in the amount of $1,000.00. On that same date, Accent filed a Claim of Lien against the Moses property in the amount of $21,890.47.

27. Once he became aware of the leaks and other construction issues, Mr. Moses engaged the services of several leak detection specialists and contractors in an attempt to remediate the problems.

28. EGF Homes Inspection Service inspected the house addition and provided a report dated August 1, 2002, listing many concerns with the construction and possible damage from moisture and leaking that was occurring. This report was not provided to Respondent, however, while he was still permitted by the Moses to remain on the job.

29. Mr. Moses hired Michael Brinsley of Guardian Home Inspections to try and pinpoint the cause and location of the leaks. Upon a visit to the Moses residence on February 28, 2003, Mr. Brinsley noted several areas that could be the source of the leaks, most notably metal flashing on the roof that had split, deck trim that was "popping loose and hanging off with improper fasteners," a garage door header beam, and a hole below the stairway at the top of the exterior that was not sealed properly. Additionally, Mr. Brinsley found that a portion of the new deck railing was not secured properly, and that the vent fan in the steam shower was improperly installed.

30. On March 28, 2003, Mr. Moses hired Terry Bachi of American Leak Detection of Daytona to determine where the leaks were occurring. On July 17, 2003, Mr. Bachi found three sources

of the leaks: one behind the north stringer at the top step just before the rolled roofing; one at the southeast corner of the second floor where the wall meets the roof; and one at the top of the sloped roof on the east side. Mr. Moses then engaged the services of Rabbit & Sons Construction Co., to make repairs based upon Mr. Bachi's findings.

31. Following the work performed by Rabbit & Sons, Mr. Bachi returned to the Moses home on August 21, 2003, to find two remaining leaks: one at the east end of the second floor deck between the siding and the rake mold; and one at the end of the roof flashing on the east side of the master bedroom.

32. Mr. Bachi returned yet again to the Moses home on February 7, 2004, to still find two sources of leaks: one behind the north stringer at the top step, which he had previously found on his first visit; and one on the east side of the master bedroom, which he had previously found on his second visit.

33. On August 8, 2003, Mr. Moses hired Mark Stroup, a certified mold remediator, of Five Star Hospitality Services to determine whether mold growth had occurred in his home as a result of moisture intrusion. Mr. Stroup is not a certified indoor environmentalist, as is Respondent, certified to perform mold testing, or a scientist with a background in environmental sciences. Mr. Stroup performs his mold detection services under the authority of his license as a general contractor.

Mr. Stroup collected samples of the air and moisture in the master bedroom and bath. Mr. Stroup then sent these samples to the Aerotech laboratory in Arizona for a report as to the mold content. No representative of Aerotech testified as to the testing of the samples or any findings based upon the samples gathered by Mr. Stroup. Moreover, Mr. Stroup was not listed as an expert by Petitioner. After Mr. Stroup was not permitted to offer expert opinion testimony, Petitioner proffered Mr. Stroup's opinion testimony on the results of the mold testing.

34. On February 2, 2004, Mr. Moses hired Thomas Bennett of Rimkus Consulting Group, Inc., to perform additional leak detection services at the Moses residence. Mr. Bennett is a registered professional engineer in Florida and other states. His company is engaged in forensic engineering. On February 11, 2004, Mr. Bennett and his technician discovered leaks at four locations: south of the garage attic hatch with water intruding from the northeast middle deck perimeter; the ledger where the flashing was not fully reflective which allowed water to intrude below by wicking; the window in the south wall of the first floor spare bedroom with water intruding from the interface above the 6x6 post-and-concrete masonry unit wall onto the floor and into the garage; and the backside of the lintel across the garage door opening.

35. Mr. Bennett returned to the Moses home on March 8, 2004, with David Baxter of Emergency Services & Reconstruction to determine what temporary repairs could be made to mitigate damage to the structure. Mr. Baxter prepared a temporary repairs/waterproofing proposal, then engaged IGC Roofing, Inc., to carry it out. This work substantially reduced the water intrusion.

36. Rimkus Consulting Group, Inc. ("Rimkus"), engaged Slocum Platts Architect ("Slocum") to devise a permanent remedy. Slocum first engaged Williamson & Associates, Inc. ("Williamson"), to develop a "remedy concept." On April 22, 2004, Shawn Ferris, an expert in water intrusion analysis and an employee of Williamson prepared conceptual details for Slocum of a proposed solution to the water intrusion problems. Slocum then prepared waterproofing sketches for Rimkus refining the Williamson details.

37. On February 11, 2005, Peter Coltune, a Florida certified general contractor for 32 years, performed an inspection of the Moses deck system to determine whether it met manufacturer specifications. Mr. Coltune identified five issues with respect to the decking system: (1) the railing posts were not secured in accordance with the USPL Carefree Xteriors HPDE Installation Instructions and Layout Guidelines ("USPL Instructions"); (2) the railing length exceeded the maximum span

of six feet as set forth in the USPL Instructions; (3) the rail was not installed using the proper blocks and the required spacing of the blocks of 24" was not followed on the four- or six-foot sections; (4) none of the railing was installed with the required brackets, screw sizes, and quantities, which has caused several sections of the railing to fall and remain in an unsafe condition; and 5) the trim was installed with nonstainless or galvanized screws or bolts, resulting in rust stains, delamination, and even components falling. In Mr. Coltune's opinion, the decking system was unsound and unsafe.

38. While Mr. Coltune used the 2003 version of the USPL Instructions for his analysis of the Moses decking system, and Respondent used the 2002 version, the installation requirements are substantially similar.

39. Respondent installed a Steamist steam bath in the Moses's master bedroom. Respondent installed a ceiling vent in the steam room, even though the Moses did not want one, and the vent installed was not the appropriate vent for a steam room.

40. At the March 12, 2003, meeting between Respondent and Mr. Moses, Respondent was prepared to have the plumber remove the ceiling vent.

41. Respondent installed the steam inlet valve 12 inches above the floor in the steam room despite the manufacturer's

instruction to place it 18 inches above the floor. Jeff Kabool, a manufacturer's representative of the Steamist company, issued a report in which he found that the steam head was 12, not 18, inches off the floor; the Steamist TC-135 control (temperature control unit) was installed outside the steam room rather than inside as designed; and that a vent was installed inside the steam room even though the installation guideline states that one should not be installed.

42. Mr. Kabool testified that he commonly sees the steam head installed 12 inches off the floor and that the unit operates properly when so installed. The unit on display at the Home Depot Expo in Orlando had the steam head located 12 inches off the floor. The temperature control unit must be inside the steam room since the thermometer that is attached to the thermostat must measure the temperature, which it cannot do from outside the unit. An older version thermostat could be located outside the steam room, but not the TC-135. The vent that was installed in the steam room is not appropriate for the Steamist unit.

43. On July 29, 2004, Mr. Moses hired a pest control service to eradicate an infestation of carpenter ants. Mr. Moses understands that carpenter ants are attracted by excessive moisture.

44. Mr. Moses documented out-of-pocket expenses of at least $23,051.86 in pursuing remediation of the water intrusion problem with the eight companies involved in the testing and remediation of the water intrusion problem.

45. Petitioner's costs related to the investigation and prosecution of this matter, excluding any amounts for attorney fees, are $930.96.

46. During and after the construction period (which effectively ended March 12, 2003, when Mr. Moses ordered Respondent off the job) Mr. Moses complained to Respondent regarding the items he believed had been constructed improperly.

47. Respondent took what appeared to be reasonable action under the circumstances in response to Mr. Moses's complaints until he had been ordered off the job, at which time he was not permitted by Mr. Moses to re-enter the property to correct any problems.

48. The professional reports concerning water intrusion, failure to build the deck according to USPL specifications, and the improper installation of the steam room, were not provided to Respondent prior to March 12, 2003, when he was ordered off the Moses job. These reports were provided to Respondent in the course of these proceedings as well as an ongoing civil lawsuit between Mr. and Mrs. Moses and Accent Builders of Florida, Inc.

49. Respondent was not permitted to address any of the deficiencies raised in the reports from the Moses's contractors in order to mitigate any further damages that might result from not addressing the identified construction deficiencies.

50. Respondent called John Bailes to testify at hearing as a former employee of Rimkus Consulting Group, Inc., who was present for a site inspection of the Moses home in February 2004. Mr. Bailes, an expert in professional engineering, observed two areas leaking during the site visit. Thereafter, Mr. Bailes worked with Slocum in formulating the design of the corrective action for the Moses residence.

51. Mr. Bailes did not observe any leaks at the post penetration during his site visits to the Moses residence.

52. Mr. Bailes recommended that the water intrusion could be eliminated without the removal and reattachment of the upper deck. This recommendation was accepted by the architects at Slocum.

53. Mr. Bailes recommended that no large portions of the decking needed to be removed to make the repairs. The repairs could be performed after removing small portions to address flashing and sealing issues.

54. The Moses residence suffered no structural failures as a result of the water intrusion.

55. Walter Allen Green, an expert in general contracting, roofing contracting and water penetration and construction defects, testified that all of the areas of water intrusion at the Moses residence could be repaired by replacing the flashing where necessary, reattaching boards where necessary, and using a high grade commercial sealant. None of the areas of drywall inspected by Mr. Green would require replacement. The drywall could be treated and left in place. None of these repairs would take more than a few hours at a relatively small cost.

56. Mr. Green also inspected the deck railing and testified that this could be fixed relatively easily with stainless steel clips. Further, the areas of the railing that had supports greater than six feet apart were only off by an inch or so. Even adding new posts, if necessary, is a job that would take no more than a day to complete.

57. Respondent, Michael Crane, has been a certified general contractor for more than 30 years. Twenty-five of those years were spent working in Volusia County, Florida.

58. Respondent was personally involved in the Moses project from its planning and permitting stages through March 12, 2003, when he was ordered off the job by Mr. Moses. He returned to the job site once in October 2004, as part of a site review by representatives of Petitioner.

59. Respondent addressed many of the items from the punch lists prior to February 26, 2003, when he arranged with Mr. Moses to meet on March 12, 2003. When this meeting was arranged, Mr. Moses never mentioned that he had sent a default letter the previous day to Respondent. When Respondent arrived at the Moses residence on March 12, 2003, he was prepared to perform repairs to the steam room consisting of moving the steam head from 12 to 18 inches from the floor; to remove the ceiling fan in the steam room; and to replace some electrical outlets that were non-functioning. Respondent was told by Mr. Moses that his lawyer instructed him not to allow Respondent to perform any work that day. Mr. Moses told him (using strong language) to leave and not come back.

60. Respondent came back to the house on March 12, 2003, to speak with Mr. Moses. He told Mr. Moses that he deserved the opportunity to make good on all the repairs, and that he would find the remaining leaks and repair them. Mr. Moses did not allow Respondent to perform any additional work from that day forward.

61. Respondent called Mr. Moses again on March 21, 2003. Mr. Moses told him at that time that no one would be allowed to work on his house until after the State investigated his complaint. Further, Mr. Moses told Respondent that he would be hiring another contractor to finish the job.

62. Respondent was aware of leaks at the Moses residence in August 2002, after the heavy rains of June and July. Respondent had the original roofer return to the job to repair the leaks, but that roofer's efforts were unsuccessful.

63. Respondent next hired Wayne Williams, a "roofer's roofer," to address the issue of the penetration of the 6x6 post. Respondent paid Mr. Williams $500 to remove the shingles, strip the roof down, then re-flash and put roof cement around the penetrating post. Respondent heard nothing more from the Moses about the penetrating post leaking after Mr. Williams' repairs prior to the litigation.

64. Respondent learned of leaks into the bedroom on the first floor in September 2002. He had the painter return to seal around the bedroom window and adjacent areas that might be involved, such as the light fixtures over the garage door. Respondent believed at that time that he had addressed the remaining water leak issues.

65. Respondent next learned of water intrusion issues on January 1, 2003, when Mr. Moses called him about more water leaking into the first floor bedroom. After measuring the amount of moisture on the drywall, Respondent promised to come back to address the issue.

66. Respondent returned two or three days later with a fan to dry the wet area in the first floor bedroom. Shortly

thereafter, Respondent met with Hal Copeland, the carpenter and a qualified window installer, to address the issue. They found what they believed to be the area where the water was intruding as a vertical joint between the 6x6 post and the siding. They put a backer rod and a urethane sealant to fill the gap completely. After this repair, Respondent received no complaint from Mr. Moses about this leak until the litigation.

67. Respondent holds the designation of a certified indoor environmentalist which qualifies him to conduct mold tests. Respondent was never given a copy of the report from Five Star Hospitality Services, dated February 12, 2003, when he was still on the job. He was provided this report during the litigation arising from the Moses job.

68. Respondent was not provided with a copy of the August 1, 2002, report from EGF Home Inspection Services prior to the litigation.

69. During the construction period, Respondent was never provided a copy of the Carefree Exteriors HDP installation instruction and layout guide or the Legacy Report dated December 1, 2003, concerning the decking materials, by Mr. Moses or anyone else. Tom Galloway, a manufacturer's representative from Carefree Exteriors came to the Moses job site on three or four occasions to speak with the carpenters about installation

of the decks. Mr. Galloway never informed Respondent or his subcontractors that they were not properly installing the decking materials.

70. On November 18, 2004, Respondent sent a certified letter to Mr. and Mrs. Moses informing them that they were in default of the construction contract, due to their refusal to allow Accent to complete the job, in the amount of $21,890.47. Respondent received no reply or further contact from Mr. or Mrs. Moses.

71. By choosing to remove the deck area and the water intrusion remediation they selected, Mr. and Mrs. Moses have expended $23,051.86 with the companies they engaged for remediation.

CONCLUSIONS OF LAW

72. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

73. In the Administrative Complaint, the Department has requested that the Board impose, among other penalties, the revocation or suspension of Mr. Crane's general contractor's certificate. Therefore, the Department has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern

and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and McKinney v. Castor, 667 So. 2d 387 (Fla. 1st DCA 1995).

74. "Clear and convincing evidence" has been defined as evidence which:

> [R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

75. The grounds proven in support of the Department's assertion that Mr. Crane's certificate should be revoked or suspended must be those specifically alleged in the Administrative Complaint. See, e.g., Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842 (Fla. 2nd DCA 1984).

76. The Board is authorized to discipline a general contractor's certificate pursuant to Section 489.129(1), Florida Statutes. Section 489.129(1) provides that the Board may take disciplinary action, including revocation, suspension,

probation, requiring restitution, imposition of an administrative fine not to exceed $5,000.00 per violation, and imposition of costs against a certificate if "the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent" is found guilty of any of a number of specified acts.

77. In this case, the Department has charged Mr. Crane with having committed the acts specified in Section 489.129(1)(g)1., (i), and (m), with regard to the events surrounding the Moses home addition.

78. The acts prohibited by Section 489.129(1)(g)1., (i), and (m), are as follows:

> (g) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:
>
> 1. Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens; . . . .
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> * * *
>
> (m) Committing incompetency or misconduct in the practice of contracting.

79. Respondent argues that Petitioner has not proven a violation of Section 489.129(1)(g)1., since it did not demonstrate that multiple, valid liens were placed on the Moses property and that these liens were not removed within 75 days either by payment or by bond. Respondent's point is that the statute, being penal in nature, must be strictly construed ". . . and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977); see also Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996). The only lien that was put into evidence at hearing was the G & W Plumbing lien in the amount of $7,361.20. The documents produced by Petitioner establish this as a valid lien, and the testimony of Mr. Moses, along with proof of payment of the lien, demonstrate that Respondent did not have the lien removed from the property within 75 days of the lien's being placed on the Moses property. While vague reference was made at hearing to other liens on the property, the only evidence of those liens is contained in Respondent's post-hearing submittal in which he admits as true that paragraph 19 of the Administrative Complaint, which states that "[o]n or about June 6, 2003,

Respondent filed a Contractor's Final Affidavit stating that all work had been paid for, with the exception of lienors G & W Plumbing, in the amount of $7,361.20, Electrical Construction Inc., in the amount of $2,101.96, and CED Tile, Inc., in the amount of $1,000.00." While this evidence is not as complete as that concerning the G & W Plumbing lien, it is clearly an admission against Respondent's interest with respect to the existence of liens on the Moses property.

80. The issue of whether Respondent violated Section 489.129(1)(g)1., thus turns on whether "the contractor has received funds from the customer to pay for the supplies or services." What is clear is that Respondent's work remained unpaid in the amount of $21,890.47 when he was ordered off the job on March 12, 2003. Petitioner did not establish that the liens filed by G & W Plumbing, Electrical Construction, Inc., or CED Tile, Inc. (which total less than the amount outstanding to Respondent), were for amounts that had already been received by the contractor. By not establishing this essential fact, Petitioner has not proven by clear and convincing evidence that Respondent is subject to discipline for violating this statutory provision.

81. Petitioner also alleges a violation by Respondent of Section 489.129(1)(m), in that Respondent demonstrated incompetency or misconduct in the practice of contracting.

Neither the statute nor Petitioner's rules provide a definition of either "incompetency" or "misconduct" in the practice of contracting. Florida Administrative Code Rule 61G4-17.001(1)(m), however, states that "misconduct or incompetency in the practice of contracting, shall include, but is not limited to:

> 1. Failure to honor a warranty.
> 2. Violation of any provision of Chapter 61G4, F.A.C., or Chapter 489, Part I, F.S.
> 3. Failure to abide by the terms of a mediation agreement."

82. Respondent did not fail to honor a warranty. The evidence strongly supports the notion that Respondent would have continued to address the water intrusion, steam shower, and decking issues at the Moses residence had he not been ordered off the job on March 12, 2003. It appears likely that, given enough opportunity, Respondent would have identified the problems and corrected them to the customers' satisfaction.

83. Respondent did not fail to abide by the terms of a mediation agreement. There was no evidence presented at hearing that the Moses and Respondent had mediated the issues at hearing and entered into any agreement disposing of any or all of the issues remaining between the parties to the construction contract.

84. Finally, Respondent did not violate any other provisions of Section 489.129, or Florida Administrative Code

Rule 61G4. While Respondent's failure to address the water intrusion, decking and steam room issues to the customer's satisfaction over a period of nine months can in no way be deemed an example of exemplary practice of contracting, Respondent's shortcomings on this job do not rise to the level of gross or repeated negligence as contemplated by Section 489.129(1)(n), or Florida Administrative Code Rule 61G4-17.001(m). By ordering Respondent off the job on March 12, 2003, the Moses did not give him the opportunity to complete the construction to their satisfaction and in accordance with the terms of the construction contract. Rather, the Moses contracted with numerous companies and individuals to support their view of the construction defects and selected an expensive solution to problems that could have been corrected, although too slowly to satisfy the Moses (and probably most customers in a similar situation), for a minimal amount of cost.

85. Petitioner attempted to demonstrate that the Moses addition was rendered uninhabitable due to the presence of toxic mold resulting from water intrusion. In order to prove the existence of mold, Petitioner called Mark Stroup, a certified mold remediator, to testify. Since Mr. Stroup was not listed as an expert on Petitioner's witness list, and since he is also not a certified indoor environmentalist (one who is certified to perform mold testing), he was not qualified to offer opinion

testimony on the presence and effect of any mold that might have occurred in the Moses residence. Further, the burden is on Petitioner "to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the evidence." Centex-Rooney Construction Co., Inc. v. Martin County, 706 So. 2d 20, 26 (Fla. 4th DCA 1997); citing Frye v. U.S., 293 F.2d 1013 (D.C. Cir. 1923). See also Ramirez v. State, 651 So. 2d 1164, 1166-67 (Fla. 1995). In this case, the witness was not listed as an expert; his qualifications to testify in a relatively new area of science were not established based upon his education, training, or experience; and he attempted to rely upon a report of tests that were performed by Aerotech, a laboratory located in Arizona, for which the witness neither worked directly nor could establish the chain-of-custody of the samples collected at the Moses residence and relied upon for the report. Moreover, the report from Aerotech is hearsay and not, as argued by Petitioner, a record of regularly conducted business subject to the exception to the hearsay rule contained under Section 90.803(6). The report is a highly specialized document containing findings that were not verified as to the chain-of-

custody of the samples collected or as to who prepared the report, and whether that person was qualified through education, training, or experience to testify as to the contents and validity of the report. Accordingly, the report from Aerotech and any testimony proffered by Petitioner from Mr. Stroup is excluded from consideration in this proceeding.

86. "Incompetency" is defined in Black's Law Dictionary as "lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation." "Misconduct" is defined in Black's Law Dictionary as "a dereliction of duty, willful in character."

87. Respondent did not display incompetence in his performance on the Moses addition. Respondent has over 30 years of experience as a general contractor, possesses the appropriate certification to do the work, and has the ability, knowledge, and fitness to perform the work. Respondent was slow in finding and repairing the leaks at the Moses residence and otherwise made some errors in his work, all of which are easily correctible, had he been given the opportunity by the Moses. Further, Respondent did not exhibit misconduct in his work on the Moses addition. Petitioner presented no evidence that Respondent willfully made errors or failed to properly construct the addition to their home. Respondent, in apparent good faith, continually tried to make good on his construction errors, even

coming to the Moses's home on New Year's Day, when a leak was discovered. Respondent appeared ready, willing, and able to remedy any problems at the job site, given sufficient opportunity. Therefore, Respondent is not guilty of incompetency or misconduct in the practice of contracting pursuant to Section 489.129(1)(m).

88. Since Petitioner failed to prove by clear and convincing evidence, that Respondent violated Sections 489.129(1)(g)1. or 489.129(1)(m), as charged by Petitioner, there is no need to discuss the nature and amount of any disciplinary measures or penalties to be imposed.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Board:

1. Dismissing Petitioner's charge of a violation by Respondent of Section 489.129(1)(g)1., Florida Statutes; and

2. Dismissing Petitioner's charge of a violation by Respondent of Section 489.129(1)(m), Florida Statutes.

DONE AND ENTERED this 25th day of May, 2005, in Tallahassee, Leon County, Florida.

S

ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 25th day of May, 2005.

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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.