STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
CONSTRUCTION INDUSTRY LICENSING
BOARD,

Petitioner,

vs. Case No. 16-2845PL

MICHAEL E. SEAMON,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 27, 2016, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Clayton T. Osteen, Esquire
Daniel S. Brackett, Esquire
Department of Business
and Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent: Frederick R. Dudley, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent practiced beyond the scope of his certified commercial pool/spa contractor's license and proceeded on a job without obtaining applicable local building department permits and inspections, as alleged in the Amended Administrative Complaint and, if so, the nature of the sanctions to be imposed.

PRELIMINARY STATEMENT

As alleged in Respondent, Michael E. Seamon's (Respondent) Petition for Formal Administrative Hearing (Petition), which was filed with the Department of Business and Professional Regulation (Petitioner or Department) on November 30, 2015,[1/] Respondent was served with the original Administrative Complaint by the Department on or about November 6, 2015. There has been no suggestion that the Petition was not timely filed.

On April 4, 2016, the Department filed an Amended Administrative Complaint against Respondent, which re-alleged (as Count Two) that Respondent performed regulated electrical contracting services involving the replacement of a swimming pool light at 7935 North Lagoon Drive, Panama City Beach, Florida (the Subject Property), without holding an electrical contractor license, and added the allegation (as Count One) that Respondent performed electrical contracting services without

having first obtained applicable local building department permits and inspections.

Respondent did not immediately amend his Petition, but did file a Motion to Dismiss Count One of Amended Administrative Complaint (Motion to Dismiss), by which Respondent requested, inter alia, that the original Administrative Complaint be forwarded to the Division of Administrative Hearings (DOAH) and that the Amended Administrative Complaint, with the new Count One, be dismissed.

On May 23, 2016, Petitioner referred the Petition and the Motion to Dismiss to DOAH.

The final hearing was scheduled for July 27, 2016. In the period leading up to the final hearing, a number of motions were filed, disposition of which may be determined by reference to the docket of this case.

On July 5, 2016, Respondent filed a Motion for Leave to Amend Petition for Administrative Hearing, which included responses to Count One of the Amended Administrative Complaint, and raised the issue of whether Petitioner's action involved the application of an unadopted rule. The Motion for Leave to Amend was granted. The Motion to Dismiss was thereafter taken up at the commencement of the final hearing, and was denied for the reasons set forth on the record.

On July 22, 2016, the parties filed their Joint Prehearing Stipulation (JPS). The JPS contained 11 stipulations of fact, each of which is adopted and incorporated herein. The JPS identified the issues of fact remaining to be litigated as:

a. Whether Respondent was required to obtain a permit;
b. Whether Respondent was able to obtain a permit;
c. Whether Respondent was working within the scope of his license; and
d. Whether Respondent replaced any circuit breaker.

The JPS identified the issues of law remaining for determination as:

a. Whether a pool contractor's scope of work includes installation of pool lights with wiring disconnect and reconnect;
b. Whether a permit was required; and
c. Whether a permit could have been obtained.

The hearing commenced on July 27, 2016, as scheduled.

At the final hearing, Petitioner presented the testimony of Respondent; Larry Carnley, a building official for Bay County, Florida; Edward Weller, who was accepted as an expert, generally, in issues related to general contracting and building inspection and enforcement[2/]; and Clarence Tibbs, who was accepted as an expert in electrical contracting.

Respondent testified on his own behalf and presented the testimony of Paul Del Vecchio, who was accepted as an expert, generally, in issues related to general contracting.

There was no objection to the documents offered by the parties, and they were presented and received in evidence as

Joint Exhibits 1 through 9, 11, 12, 14 through 20, 23, 24, 26, 27, and 29. Joint Exhibit 5 was the deposition of John Patronis, owner of the Subject Property. Exhibits 15, 17, 18, and 19 consisted of, respectively, the expert deposition testimony of John Garner (Respondent's expert – pool contracting), David Pruette (Respondent's expert – electrical contracting), Roy Lenois (Petitioner's expert – pool contracting), and Mr. Del Vecchio. Exhibit 20 was the deposition testimony of Respondent, and Exhibit 29 was the deposition testimony of Ian Brown, Petitioner's chief construction attorney, who testified as Petitioner's corporate representative.

Official recognition was taken of final orders of the Construction Industry Licensing Board (CILB) entered as declaratory statements. Those final orders were In re: The Petition for Declaratory Statement of David B. Levesque, Final Order No. BPR-2007-03277 (Apr. 24, 2007); In re: The Petition for Declaratory Statement of James Flaherty, File # 2009-09479 (Nov. 16, 2009); and In re: The Petition for Declaratory Statement of Richard P. Conway, et al., File # 2010-11969 (Dec. 27, 2010).

A one-volume Transcript of the proceedings was filed on August 18, 2016. By agreement of the parties, the time for submitting post-hearing submittals was set at 15 days after the

filing of the Transcript. By unopposed motion, the time was extended to September 6, 2016. Both parties timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

The actions that form the basis for the Amended Administrative Complaint occurred in September 2014. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Accordingly, all statutory and regulatory references shall be to the 2014 versions, unless otherwise specified.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of the construction industry, including pool and spa contractors and electrical contractors, pursuant to section 20.165 and chapters 455 and 489, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was licensed as a commercial pool/spa contractor in the State of Florida, having been issued license numbers CPC 05661, 1457406, and 1458031. Respondent was the primary qualifying agent of Cox Building Corporation, d/b/a Cox Pools (Cox Pools).

3. Respondent has been registered, certified, or licensed as a swimming pool contractor since 1978. Over the course of

his almost 40 years as a swimming pool contractor, Respondent has replaced thousands of pool lights and pool pumps. He believed that the replacement of pool equipment, which he understood to include pool lights, was within the allowable scope of work as a swimming pool contractor.

4. On or about September 12, 2014, Cox Pools entered into a contract with John Patronis to replace four pool light fixtures, a booster pump, and other miscellaneous services for $4,681.17 at the Subject Property. The Subject Property falls within the jurisdiction of the Bay County Building Department.

5. Respondent did not obtain an electrical permit for replacing the pool light fixtures at Subject Property.

6. Mr. Carnley testified that the Bay County Building Department requires that pool light replacement be performed by a licensed electrician, and with a county-issued electrical permit. The permit must be obtained by an electrical contractor or a homeowner. Bay County would not have issued a permit to Respondent, because he was not an electrical contractor.

7. The Bay County Building Department also requires an electrical permit for the replacement of a circuit breaker in the electrical box serving a swimming pool. A pool contractor is not authorized to replace circuit breakers. No permits were obtained to replace circuit breakers at the Subject Property.

8. On September 15, 2014, during the course of replacing the pool light fixtures, an employee of Cox Pools, Joshua Cook, was electrocuted. The precise cause of the electrocution was not established, though no plausible basis exists for it being related to anything other than the replacement of the pool lights.

9. After a period of several days following the accident involving Mr. Cook, Respondent returned to the Subject Property to complete the job. He personally went into the pool, put the light in the fixture and screwed it in, and left. The light was thereafter wired and energized by a Cox Pool service technician.

10. Given the circumstances, Mr. Patronis was not asked to complete payment for the services performed. Nonetheless, it is clear that, but for the accident, Mr. Patronis would have been expected to pay for the services for which he contracted.

11. The photographic evidence in this case demonstrates that between September 15, 2014, and some indeterminate time in 2016, a circuit breaker was replaced in the electrical box serving the Subject Property's pool. The circuit breaker that existed on September 15, 2014, was a ground-fault circuit interrupter (GFCI). By 2016, the GFCI has been replaced with an arc-fault circuit interrupter (AFCI). Had Bay County performed an inspection of the electrical box with the AFCI, it would not have passed inspection.

12. Respondent testified that he did not change the circuit breaker, that Cox Pools keeps no inventory of circuit breakers, and that service technicians do not carry circuit breakers on the trucks. Respondent acknowledged his understanding that replacing a circuit breaker is a job for an electrical contractor.

13. At some time "recently," Williams Electric was called to the Subject Property, at which time Mr. Williams "swapped out a breaker or two that was an incorrect type of breaker for the application." Mr. Patronis was not clear whether an arc breaker was replaced with a ground breaker, or vice versa.

14. Pool lights are sealed units. The light and its power cord come as a single unit. To replace a pool light, the main circuit breaker at the swimming pool sub-panel is turned off. The wires to the existing light are disconnected (unscrewed) from the circuit breaker. A lead is tied to the end of the wire. The light fixture is removed from the pool opening, and the wire is pulled through the existing conduit from the pool side. When the old fixture and wiring unit has been removed, the lead is removed from the end of the old unit's wire, tied to the wiring of the new light, and drawn back through the conduit to the circuit breaker box. The new light is screwed into the fixture, and then energized by connecting the wires back into the existing circuit breaker.

15. The point of connection of the light to the circuit breaker is the "load side" of the circuit.

16. The experts who testified in this proceeding were all competent and qualified in their fields, and had served in leadership positions with the CILB (Mr. Weller, Mr. Del Vecchio, and Mr. Lenois), the Electrical Contracting Licensing Board (Mr. Tibbs), or the Florida Swimming Pool Association (Mr. Garner and Mr. Pruette). However, despite the relative simplicity of the statutes at issue, their opinions as to the allowable scope of work under a swimming pool contractor license were at odds.

17. Respondent acknowledged, and the evidence in this case establishes, that electrical work associated with new pool construction is a task that is within the scope of work of an electrical contractor. Initial construction involves substantial work in bringing power from the main residential panel to the new pool panel, installing a junction box and circuit breakers, installing the wiring, and performing other electrical work of significantly greater complexity than that involved in the installation of equipment into a pre-constructed electrical system, which involves only the disconnect and reconnect of wires to the load side of a circuit breaker. As discussed by Mr. Lenois, a pool contractor can contract for the

entire pool, but cannot self-perform the electrical components pursuant to section 489.113.

18. As to the replacement of existing equipment, Petitioner's experts testified that pool light fixtures differ from other pool-related equipment, e.g., pool pumps, in that the light fixtures have direct contact with the water, whereas other components do not. Lights are changed out in a submerged condition, which makes them extremely dangerous. As stated by Mr. Weller, "the whole area of electricity around pools gets complicated, between the bonding, the grounding, and all the other stuff."

19. It was Mr. Weller's opinion that, although pool contractors can contract for pool light replacement, they cannot self-perform the work. Rather, the electrical work involved in replacing pool light fixtures should be subcontracted to an electrical contractor because "you can make mistakes in plumbing, and you can make mistakes in other areas, but with electricity, it's pretty non-forgiving, especially if you're around water."

20. Mr. Lenois distinguished pool lights, which he characterized as accessories since all pools do not have them, from pool equipment, which includes pumps and filters, heaters, specialty filters, and salt generators, which are mounted at the pump and filter area.

21. Respondent's experts were uniform in their opinions that the act of disconnecting and reconnecting pool lights, as well as other pool equipment, at the load side of a breaker does not constitute electrical contracting. Mr. Pruette testified that disconnecting and connecting a pool light at a circuit breaker is not a difficult or complex task, and can be easily performed with a little training. Mr. Del Vecchio testified that the disconnection and connection of pool lights at the circuit breaker is no different than that performed by a plumber in replacing a hot water heater, or an air-conditioning contractor in replacing a piece of air-conditioning equipment.

22. Almost all of the experts either replaced pool lights as part of their routine scope of work or knew of pool contractors who did so, a practice that appears to be commonplace. Furthermore, several of the witnesses worked in areas of the state in which county building officials did not require permits, electrical or otherwise, for the replacement of pool lights, though the evidence in that regard was generally hearsay. Mr. Lenois, who testified on Petitioner's behalf, stated his opinion that reasonable people could differ as to the meaning of the statutory language placing the "installation, repair, or replacement of existing equipment" within the scope of work of a pool/spa contractor.

23. The issue of the extent to which electrical work is subsumed within the statutory scope of work of a pool/spa contractor of "installation, repair, or replacement of existing equipment" has been the topic of considerable discussion in the industry. In that regard, the Florida Pool and Spa Association has filed a Petition to Initiate Rulemaking with the CILB seeking, among other things, to "clarify[] the scope of a certified pool contractor's license to include the installation, repair, and replacement of pool equipment, up to and including the electrical connection on the demand side of the power source." There was no evidence as to the disposition of the petition.

24. Respondent argued that Florida Administrative Code Rule 61G4-16.001(9), which establishes that five percent of the written certification exam for commercial pool/spa contractors is to cover "electrical work," is evidence that electrical work is within the scope of work for a pool contractor. Electrical work associated with pool construction includes grounding for the pool shell itself. Thus, a degree of knowledge of basic electrical work and codes would be warranted, regardless of whether equipment electrical connections are within the scope of work for a pool/spa contractor.

25. The parties introduced a series of DBPR-approved course outlines and instructor applications for a three-hour

class, sponsored by the Florida Pool and Spa Association, entitled "Basic Electricity and the NEC [National Electric Code] for Swimming Pools," and a one-hour class, sponsored by the Florida Pool and Spa Association, entitled "Basic Electrical Requirements for Pools." The course outline prepared by the Florida Pool and Spa Association for each of the approved courses provides, in bold font, that:

> Instructor is aware that electrical work does not fall within the scope of work of licensed pool/spa contractors. No instruction on how to perform electrical work will take place. Course will provide much needed understanding of the basics of electricity as well as those aspects of the NEC as they pertain to pools and spas. Instructor will also emphasize the importance of using a licensed electrical contractor to perform required work.

CONCLUSIONS OF LAW

A. Jurisdiction

26. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

B. Standards

27. Section 489.129(1) provides, in pertinent part, that:

> (1) The board may take [disciplinary] actions against any certificateholder or registrant . . . if the contractor . . . or business organization for which the contractor is a primary qualifying

> agent . . . is found guilty of any of the following acts:
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> * * *
>
> (c) Violating any provision of chapter 455.
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> * * *
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> (o) Proceeding on any job without obtaining applicable local building department permits and inspections.

28. Section 455.227(1)(o) provides that:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (o) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform.

29. Section 489.105(3)(j) defines a "commercial pool/spa contractor" as:

> [A] contractor whose scope of work involves, but is not limited to, the construction, repair, and servicing of any swimming pool, or hot tub or spa, whether public, private, or otherwise, regardless of use. The scope of work includes the installation, repair, or replacement of existing equipment, . . . and the installation of new pool/spa equipment, . . . [and] the installation of package pool heaters . . . .

30. Section 489.113(3) provides, in pertinent part, that "A contractor shall subcontract all electrical . . . work,

unless such contractor holds a state certificate or registration in the respective trade category . . . ."

31. Section 489.1195(1) provides, in pertinent part, that:

> (a) All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.

C. The Burden and Standard of Proof

32. Petitioner bears the burden of proving the specific allegations of fact that support the charges alleged in the Administrative Complaint by clear and convincing evidence. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

33. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

> [E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

> Clear 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 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

34. Sections 489.129(1)(o) and 455.227(1)(o) are penal in nature, and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v.

Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

D. Comparable Statutes

35. The issue in this case must be considered in light of the statutory definitions of "Class A air conditioning contractor," "Class B air conditioning contractor," and "mechanical contractor" established in subsections 489.105(3)(f), (g), and (i), respectively. The scope of work for each of those contractors specifically allows those contractors "to replace, disconnect, or reconnect power wiring on the load side of the dedicated existing electrical disconnect switch." The scope of work for a "commercial pool/spa contractor" or a "residential pool/spa contractor established in subsections 489.105(3)(j) and (k) contains no such allowance.

36. "The doctrine of in pari materia is a principle of statutory construction that requires statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Taylor Morrison Servs. v. Ecos, 163 So. 3d 1286, 1291 (Fla. 1st DCA 2015).

37. The fact that the Legislature provided specific authority for air-conditioning contractors and mechanical contractors to perform disconnect/reconnect electrical services,

but did not provide such authority in the same statutory section for pool/spa contractors to perform such electrical services, is strong evidence that the Legislature did not intend for pool/spa contractors to be excluded from the effect of section 489.113(3). See Bd. of Trs. v. Lee, 189 So. 3d 120, 126-127 (Fla. 2016).

E. Construction of the Statutes

38. Despite the imprecision of the pool/spa contractors' scope of work language in section 489.105, there is no reasonable way to construe the statutory parameters as a whole in a way that allows pool/spa contractors to perform electrical work, regardless of its purported simplicity or of the inclination of pool/spa contractors to perform such work.

39. When read together, as they must be, section 489.105, including those sections pertaining to air-conditioning and mechanical contractors, and section 489.113, which requires that electrical work be subcontracted, cannot be logically construed to allow pool/spa contractors to disconnect or reconnect power wiring on the load side of a dedicated existing electrical disconnect switch. Thus, there is no ambiguity that would preclude the CILB from enforcing the statutory restriction against pool/spa contractors self-performing electrical work, including the disconnect/reconnect of replacement pool lights at the circuit breaker.

F. Declaratory Statements

40. Official recognition was taken of three declaratory statements entered by the Department from 2007 to 2010.

41. With regard to the weight and effect of a declaratory statement entered after the 1996 amendments to chapter 120, it is well established that:

> The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. See § 120.565, Florida Statutes (1996). A party who obtains a statement of the agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently, or to explain why a different application is required.

Chiles v. Dep't of State, Div. of Elec., 711 So. 2d 151, 154-155 (Fla. 1st DCA 1998), approved Fla. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. Inv. Corp., 747 So. 2d 374 (Fla. 1999).

42. Having reviewed the declaratory statements for which official recognition was taken, they are determined to have no effect on the conclusions reached herein.

43. The declaratory statement entered in In re: The Petition for Declaratory Statement of David B. Levesque, Final

Order No. BPR-2007-03277 (Apr. 24, 2007), was filed by an individual seeking to determine whether he could install a self-contained circulating system in an existing bathtub. In his petition, Mr. Levesque indicated that he "do[es] not run any electrical circuits to the bathtub for the motor or heater. Those circuits are installed by a state licensed electrical contractor." With regard to servicing, he indicated that his "work consists of the power run from the disconnect, whether it is a circuit breaker or quick disconnect and leads to the hot tub." The CILB stated the questions presented as: 1) "[i]s a license required for installation of a self contained water circulating system in a bathtub"; and 2) "[i]s a license required to make electrical connections related to hot tubs." As to the first question, the CILB provided that "[a]s long as the installer is not tying into a potable water or sewer system no license is required." As to the second question, the CILB provided that "[t]he Construction Industry Licensing Board does not have jurisdiction over interpretation of practice acts other than Part I of Section 489, F.S." Thus, as to the electrical issue, the CILB expressed no opinion, since it does not have jurisdiction over chapter 489, part II, relating to electrical contracting. Therefore, the declaratory statement expresses no agency position on the issues in this case.

44. The declaratory statement entered in In re: The Petition for Declaratory Statement of James Flaherty, File # 2009-09479 (Nov. 16, 2009), was filed by an individual seeking to determine whether a certified plumbing contractor "is permitted to condemn, remove and replace a heating element & thermostat on an electric water heater." The CILB answered the question in the affirmative, stating "that certified or registered plumbing contractors may condemn, remove and replace a heating element and thermostat on an electric water heater because such services are within the scope of their certification or registration." The declaratory statement makes no statement regarding whether Mr. Flaherty would be authorized to perform a disconnect or reconnect of the hot water heater at the circuit breaker. Therefore, the declaratory statement expresses no agency position on the issues in this case.

45. The declaratory statement entered in In re: The Petition for Declaratory Statement of Richard P. Conway, et al., File # 2010-11969 (Dec. 27, 2010), was filed by an individual seeking to determine whether the scope of work for a certified pool servicing contractor included "adding a pool heating system – a solar type that connects to the existing pool filtration system." The CILB determined that such work is within the pool servicing contractor's scope of work. The declaratory statement makes no statement regarding whether such a solar pool heater

connects to the home electrical system, or whether Mr. Conway would be authorized to perform a disconnect or reconnect of a solar heating system at a circuit breaker. Therefore, the declaratory statement expresses no agency position on the issues in this case.

G. Compensation

46. Petitioner has proven by clear and convincing evidence that Respondent and/or Cox Pools contracted, for compensation, with Mr. Patronis.

47. Section 489.105(3) provides, in pertinent part, that "'[c]ontractor' means . . . the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others . . . [work within] the job scope described in one of the paragraphs of this subsection." Section 489.105(6) provides that:

> The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for a bid, or attempted sale of these services requires the corresponding licensure.

48. Although Respondent did not collect the $4,681.17 set forth in the contract for services, it is clear that, but for the unique and tragic events that occurred at the Subject Property, payment of such amount at the completion of the work

was expected by both parties. Therefore, the work that forms the basis for the Amended Administrative Complaint is subject to chapter 489.

H. Amended Administrative Complaint

Count One

49. Count One of the Amended Administrative Complaint alleges that Respondent violated section 489.129(1)(o) by proceeding on a job without obtaining applicable local building department permits and inspections. Given the admissible testimony and evidence presented at the final hearing, Petitioner proved, by clear and convincing evidence, that Respondent failed to obtain an electrical permit from the Bay County Building Department.

50. The evidence is undisputed that Bay County required an electrical permit for the replacement of pool lights and, in particular, for the act of disconnecting, reconnecting, and energizing such lights. There was no evidence to suggest that Respondent sought to engage Bay County in an effort to explain his position, or persuade Bay County that it was misconstruing the statutes. Rather, Respondent proceeded at its own risk, on the assumption that his construction of the statutes was correct.

Count Two

51. Count Two of the Amended Administrative Complaint alleges that Respondent violated section 489.227(1)(o) by practicing, or offering to practice, beyond the scope permitted by law, or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform. Count Two is predicated on allegations of two separate acts, the first being whether a pool contractor's scope of work includes installation of pool lights with wiring disconnect and reconnect, and the second being whether Respondent replaced any circuit breaker, an act that was stipulated as being beyond the scope of a pool and spa contractor.

Pool Lights

52. Given the admissible testimony and evidence presented at the final hearing, Petitioner proved, by clear and convincing evidence, that Respondent operated beyond the scope of his pool contractor's license by disconnecting, connecting, and energizing the pool lights replaced at the Subject Property.

53. The requirement in section 489.113(3) that a contractor subcontract all electrical work, combined with the lack of any allowance for such electrical work to be performed under the scope of the pool contractor's license established in

section 489.105, leads to the conclusion that the requirement is not so ambiguous as to militate against its enforcement.

Circuit Breaker

54. Given the admissible testimony and evidence presented at the final hearing, Petitioner failed to prove, by clear and convincing evidence, that Respondent replaced a circuit breaker in the Subject Property's breaker box.

55. The only evidence that Respondent was responsible for changing circuit breakers at the Subject Property consisted of photographs introduced as Exhibits G1 and G2.[3/]

56. During his deposition, it was evident that Mr. Patronis was vague as to the photographs that comprised Exhibits G1 and G2, initially testifying that "I don't know when they were taken and I don't know who took them." It was not until being prompted by counsel for Petitioner, who was apparently the photographer, that he and "Dan," had been at Mr. Patronis' home to take pictures, that Mr. Patronis was able to identify the breaker box depicted in Exhibits G1 and G2. However, it was clear that he had not undertaken close examination to ascertain whether the individual breaker depicted in the photograph was the one that existed after Respondent completed the work at the Subject Property in 2014.

57. The date on which Exhibits G1 and G2 were taken was not established, with the only evidence being that of Mr. Brown,

as Petitioner's corporate representative, who understood that they were taken "sometime several months ago but sometime this year."

58. The allegation in this case is that Respondent changed a circuit breaker within several days of the September 2014 incident. The only way to establish that fact is by inference, i.e., that the AFCI circuit breaker that was in the panel in 2016 when the photographs were taken was installed by Respondent in 2014, based on Mr. Patronis' testimony that, to his knowledge, no work had been done on the panel during the interval. The evidence simply is not strong enough to support that inference. The photographs, taken well after the alleged event, are not clear and convincing evidence that Respondent installed, or was responsible for the installation of the AFCI breaker depicted in those photographs.

I. Unadopted Rule

59. Respondent's Amended Petition for Formal Administrative Hearing, filed on July 5, 2016, asserted that Petitioner's position in this proceeding constituted the application of an unadopted rule. That issue was not set forth in the JPS as an issue of fact or law remaining for disposition. The failure to identify issues of fact or law remaining to be litigated in a prehearing stipulation constitutes a waiver and

elimination of those issues. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015).

60. The issue of whether the Department relied on an unadopted rule was not argued at the final hearing. Nonetheless, Respondent, in the Statement of the Issues section of his Proposed Recommended Order, again raised as an issue "whether Petitioner impermissibly based this prosecution on an unadopted rule." The Proposed Recommended Order does not otherwise argue the merits of that issue. Given Respondent's apparent efforts to raise and rely upon the issue of whether the Amended Administrative Complaint was based on the application of an unadopted rule, an evaluation is warranted.[4/]

61. Section 120.57(1)(e) provides, in pertinent part, that:

> (e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.
>
> 2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

> a. The challenge may be pled as a defense using the procedures set forth in s. 120.56(1)(b).
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> b. Section 120.56(3)(a) applies to a challenge alleging that a rule is an invalid exercise of delegated legislative authority.
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> c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.
>
> d. This subparagraph does not preclude the consolidation of any proceeding under s. 120.56 with any proceeding under this paragraph.

62. An "unadopted rule" is defined as "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." § 120.52(20), Fla. Stat. A "rule" is defined, in pertinent part, as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." § 120.52(16), Fla. Stat.

63. Respondent did not introduce evidence sufficient to establish that Petitioner's interpretation of chapter 489, as discussed herein, "imposes any requirement . . . not specifically required by statute." Furthermore, there was no evidence to support a conclusion that the issuance of the Amended Administrative Complaint was a statement "of general

applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency." Thus, Petitioner's application of provisions of chapter 489 as requiring a pool/spa contractor to subcontract the electrical work involved in replacing pool lights is not an unadopted rule pursuant to section 120.57(1)(e)1.

J. Penalty

64. Respondent is subject to disciplinary action by the CILB pursuant to section 489.129.

65. Section 455.2273 requires each board within the Department to adopt, by rule, disciplinary guidelines applicable to each ground for disciplinary action that may be imposed by the board.

66. Section 489.129(4) provides that:

> (4) In recommending penalties in any proposed recommended final order, the department shall follow the penalty guidelines established by the board by rule. The department shall advise the administrative law judge of the appropriate penalty, including mitigating and aggravating circumstances, and the specific rule citation.

67. Petitioner adopted Florida Administrative Code Chapter 61G4-17 to establish the CILB's disciplinary guidelines, which guidelines include penalty ranges and aggravating and mitigating circumstances.

68. There was no evidence adduced at the final hearing to suggest that the violations alleged in the Amended Administrative Complaint were repeat offenses. Thus, they are reviewed as first offenses.

69. The penalties established for a first violation of section 489.129(1)(o), for:

> Proceeding on any job without obtaining applicable local building department permits and/or inspections.
>
> * * *
>
> 3. Job finished without a permit having been pulled, or no permit until caught after job, or late permit during the job resulting in missed inspection or inspections.

range from a $1,000 fine to a $5,000 fine and probation. Fla. Admin. Code R. 61G7-17.001(1)(o).

70. The disciplinary guidelines established by the CILB do not include a specific penalty for a violation of section 455.227(1)(o) for "[p]racticing or offering to practice beyond the scope permitted by law." However, rule 61G4-17.001(6) provides that:

> The absence of any violation from this chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed. The guideline penalty for the offense most closely resembling the omitted violation shall apply.

71. Rule 61G4-17.001(1)(i)2. establishes penalties for a first violation of sections 489.113 and 489.117 for "[c]ontracting beyond scope of license, safety hazard is created." The conduct described underlying the penalty guideline established by rule 61G4-17.001(1)(i)2. is substantively identical to that alleged and proved in this case, thus allowing its application. The penalties established range from a $4,000 fine and probation or suspension to an $8,000 fine and probation, suspension, or revocation.

72. Rule 61G4-17.002 establishes aggravating and mitigating circumstances as follows:

> Circumstances which may be considered for the purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:
>
> (1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)
>
> (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
>
> (3) The danger to the public.
>
> (4) The number of complaints filed against the licensee.

(5) The length of time the licensee has practiced.

(6) The actual damage, physical or otherwise, to the licensee's customer.

(7) The deterrent effect of the penalty imposed.

(8) The effect of the penalty upon the licensee's livelihood.

(9) Any efforts at rehabilitation.

(10) Any other mitigating or aggravating circumstances.

73. The primary aggravating circumstance present in this case was the potential danger to the public, as evidenced by the electrocution of Mr. Cook, although the precise cause of that event was unexplained. The act of disconnecting and reconnecting wires to the circuit breaker is a relatively simple and not inherently dangerous act, particularly given the sealed-unit nature of pool lights, but clearly had a tragic outcome here.

74. Mitigating circumstances include the fact that Respondent has been in business for years with no prior discipline.

75. Of greater cause for mitigation is the fact that replacement of pool lights, including disconnect and reconnect to the load side of the breaker, is widely understood by those engaging in pool contracting to be within the scope of a pool

contractor's license. The experts for both parties, who were skilled and experienced, and served in governmental and industry leadership positions, either engaged in the practice under the scope of their licenses, or knew of those who did. There was an acknowledgement by Mr. Lenois that reasonable people could differ as to the scope of the allowable services. The evidence suggests that this case is the first in which the Department has taken enforcement action against a pool contractor for replacing pool lights, despite evidence that such has been performed countless times by countless licensees over a period of many years. The publicity of Mr. Cook's demise no doubt stirred the Department to action. Nonetheless, the fact that Respondent was acting consistently with a widespread, though incorrect, practice is significant evidence of mitigation that may be considered under rule 61G4-17.002(10). Such mitigation would apply to the proven elements of both Count One and Count Two.

76. Petitioner has requested that Respondent's commercial pool/spa contractor licenses be suspended for 90 days, followed by a period of probation for four years; and that Respondent be required to complete an approved, live seven-hour continuing education course, in addition to any otherwise required continuing education, with an emphasis on chapter 489 and the rules enacted pursuant thereto.

77. Petitioner's penalty request was based upon Respondent being found to have violated each element of the counts brought against him. However, the evidence did not establish that Respondent replaced a circuit breaker, an act that would have warranted a more severe penalty, since it was well understood that such was outside of the scope of a pool contractor's license.

78. The undersigned concludes that mitigation is appropriate for the reasons set forth herein. Given that the incident regarding Mr. Cook was, based on the lack of evidence to the contrary, an isolated, unusual, and unexplained occurrence, the mitigating circumstances outweigh the aggravating circumstance. In addition, given that a significant element of Count Two was not proven, a penalty less than that requested by Petitioner is appropriate. Given the common understanding of those in the industry as described in paragraphs 21, 22, and 75, a suspension of Respondent's license is not warranted. However, a penalty at the low end of the established range remains appropriate.

79. Section 455.227(3) provides that "[i]n addition to . . . discipline imposed for a violation of any practice act, the board . . . may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time." Although Petitioner requested the assessment

of costs in the amount of $477.54 in its Proposed Recommended Order, there was no evidence provided to substantiate that request.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Construction Industry Licensing Board enter a final order finding that Respondent violated section 489.129(1)(o), Florida Statutes, as alleged in Count One; and sections 455.227(1)(o) and 489.129(1)(c), Florida Statutes, as alleged in Count Two, but only as that count pertains to the replacement of pool lights. It is further recommended that:

a. Respondent be subject to a fine of $1,000 for a first violation of section 489.129(1)(o);

b. Respondent be subject to a fine of $4,000, and that Respondent's commercial pool/spa contractor licenses be subject to a period of probation for two years for a first violation of section 455.227(1)(o) and section 489.129(1)(c); and

c. Respondent be required to complete an approved, live seven-hour continuing education course, in addition to any otherwise required continuing education, with an emphasis on chapter 489 and the rules enacted pursuant thereto.

DONE AND ENTERED this 5th day of October, 2016, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2016.

ENDNOTES

[1/] The sequence of events leading to the referral of this case to DOAH is described in Respondent's Motion to Dismiss Count One of Amended Administrative Complaint, and is not otherwise supported by the record. The allegations are referenced herein merely to establish the background as to how the Amended Administrative Complaint came to be at issue. The background information is not material to any disputed issue of fact, and should not be considered to be a finding of fact upon which any conclusion or recommendation is based.

[2/] Petitioner initially offered Mr. Weller as an expert in chapter 489, part I, Florida Statutes, and permitting. Counsel for Respondent objected to Mr. Weller being offered to opine as to how the statute and the Department's rules, or the Florida Building Code should be interpreted, or otherwise testify regarding questions of law, citing to Seibert v. Bayport Beach & Tennis Club Association, 573 So. 2d 889 (Fla. 2d DCA 1990). A discussion was held in which Respondent's position was upheld. However, a specific ruling on the motion was reserved, and a standing objection allowed, pending review of the case cited by Respondent. Having reviewed the case cited, and subsequent cases standing for the same proposition (see, e.g., Gyongyosi v. Miller, 80 So. 3d 1070 (Fla. 4th DCA 2012; Lindsey v. Bill

Arflin Bonding Agency, 645 So. 2d 565 (Fla. 1st DCA 1994)), the undersigned agrees with Respondent. Thus, any testimony regarding the interpretation of the Florida Building Code, or the Bay County building ordinances, is specifically found to have no weight in this proceeding.

[3/] The authenticity of photographic Exhibits G1 and G2 was discussed during the hearing. Mr. Patronis, whose testimony was offered by deposition, and had thus not been reviewed during the final hearing, testified that the photographs were generally an accurate representation of the conditions at his house when the photographs were taken in 2016. However, Exhibits G1 and G2 were the subject of an objection by Respondent based on the fact that Mr. Patronis did not take the photographs and could not otherwise authenticate them.

It is well established that "[i]n order to lay the necessary foundation for a photograph, it is usually necessary to establish that the photograph is a fair and accurate representation of the scene that it depicts. Any witness with knowledge that [the photograph] is a fair and accurate representation may testify to the foundational facts; the photographer need not testify." Charles W. Ehrhardt, Ehrhardt's Florida Evidence, §401.2 (2016 Edition).

Mr. Patronis' testimony was sufficient to authenticate the photograph only to the extent that it depicted the pool breaker box at the Subject Property in 2016. It was not sufficient to establish, or to allow an inference, that the photograph depicted the breaker box after Respondent completed the 2014 pool work, or even whether the photograph was taken before or after a breaker was "swapped out" by Williams Electric. Thus, Exhibits G1 and G2 are accepted as depicting the pool breaker box at some recent time and for no other purpose.

[4/] Petitioner argues that the 2016 amendments to section 120.57(1)(e) allowing for a challenge to an unadopted rule cannot be applied in this case, because they create new, substantive rights on the part of Respondent by establishing a new "defense" that did not previously exist.

The 2016 amendment of section 120.57(1)(e) "was designed to protect regulated persons from an agency's use of an invalid or unadopted rule in enforcement, licensing or other § 120.57 proceedings." H. French Brown, IV and Larry Sellers, The 2016 Amendments to the APA: Say Goodbye to United Wisconsin – and More, Fla. Bar J., Sept./Oct. 2016, at 46. It is well

established that, even before the 2016 amendments to chapter 120, "[a]n agency may not base agency action that determines the substantial interests of a party on an unadopted rule." Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Servs., 156 So. 3d 520, 531 (Fla 1st DCA 2015). The 2016 amendments to sections 120.57 create no new substantive rights, but serve only to establish a procedure by which a substantially affected party may enforce pre-existing rights against the application of an unadopted rule. Thus, the 2016 amendments to section 120.57(1)(e) are procedural in nature and may be applied in this case.

Petitioner's reliance on Smiley v. State, 966 So. 2d 330 (Fla. 2007), and Arrow Air v. Walsh, 645 So. 2d 422 (Fla. 1994), is misplaced. Both of those cases involved the creation of entirely new causes of action that could be raised as a defense (the creation of a statutory "stand your ground" defense in abrogation of the common law duty to retreat as discussed in Smiley) or as a separate cause of action (creation of a new cause of action to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public, found to directly affect substantive rights and liabilities because a common law tort for retaliatory discharge had not been recognized in Florida as discussed in Arrow Air). Both enactments created substantive rights, liabilities, or duties that did not previously exist. Such substantive rights are not created by the 2016 amendments to section 120.57.

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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.