

IN THE MATTER OF THE CLAIM	* BEFORE ROBERT F. BARRY,
OF MICHAEL D. GRECO,	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE OF
IMPROVEMENT FUND	* ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	* OAH NO.: DLR-HIC-02-07-47529
DAVID B. BARKLEY,	* MHIC NO.: 06(90)1493
T/A OMEGA CONSTRUCTION &	*
REMODELING,	*
MHIC REG. NO. 05-51578	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 23, 2007, Michael D. Greco (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,000.00 for actual losses suffered as a result of inadequate home improvement work performed by David B. Barkley, t/a Omega Construction & Remodeling (Respondent). On October 9, 2007, the MHIC ordered that a hearing be held on the claim. On October 16, 2007, the MHIC transmitted the case to the Office of Administrative Hearings (OAH).

On July 1, 2008, I conducted a hearing at the OAH-Wheaton, Westfield North, Suite 205, 2730 University Boulevard, West, Wheaton, Maryland 20902. The Claimant appeared and represented himself. Hope Miller, Assistant Attorney General, Department of Labor, Licensing & Regulation (DLR), represented the Fund. The Respondent received notice of the hearing by certified mail, but did not appear.

The contested-case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); the procedural regulations of the DLLR, Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; and the Rules of Procedure of the OAH, COMAR 28.02.01, govern procedure.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted six exhibits, all of which were admitted into evidence:

CLAIM #1 - Home Improvement Claim Form; Letter, January 22, 2007, from the Claimant to the MHIC; Complaint Form with attached Statement

CLAIM #2 - Agreement; Specifications; Final Cost & Draw Schedule

CLAIM #3 - Canceled Checks; Contractor's Invoices; Agreement

CLAIM #4 - Proposals: American Residential Services, October 27, 2006; Jim's, November 2, 2006;

Evaluation, UBuildIt, November 30, 2006

CLAIM #5 - Letter, June 13, 2006, from the Respondent to the Claimant;

Letter, June 19, 2006, from the Claimant to the Respondent;

Letter, July 24, 2006, from the Claimant to the Respondent;
Letter, November 6, 2006, from the Respondent to the Claimant;
Letter, December 5, 2006, from the Respondent to the Claimant;
Letter, December 10, 2006, from the Claimant to the Respondent;
Letter, January 18, 2007, from the Respondent to the Claimant

CLAIM #6 - Chronology, September 9, 2004 through May 27, 2008

The Fund submitted four exhibits that were admitted into evidence:

- FUND #1 - Notice of Hearing, April 7, 2008
- FUND #2 - Respondent's Licensing History as Contractor/Salesman
- FUND #3 - Hearing Order
- FUND #4 - Letter, February 21, 2007, from the MHIC to the Respondent, with attachments:
 - Home Improvement Claim Form
 - Letter, January 22, 2007, from the Claimant to the MHIC

Testimony

The Claimant testified on his own behalf; his wife testified briefly. The Fund did not present any witnesses.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant to this case, including when the Respondent contracted to and performed home-improvement work on the Claimant's residence, the Respondent was licensed by the MHIC as a home improvement contractor/salesman under MHIC Registration number 01-70346.

2. On April 7, 2008, the OAH sent a Notice of Hearing to the Respondent by certified mail. The Respondent signed a receipt for delivery of the Notice of Hearing.

3. At all times relevant to this case, the Claimant and his wife lived at 13400 Sherwood Forest Drive, Silver Spring, Maryland 20904.

4. On August 8, 2004, the Claimant and the Respondent entered into a contract for \$110,000.00 to have the Respondent build an addition to their residence. There were additions to the contract that totaled \$1,003.00.

5. The interior portion of the addition was approximately 640 square feet, with a large room of 520 square feet and a small bedroom of 120 square feet.

6. The contract contained a section titled "HVAC" that provided for two wall-mounted HVAC units to be installed in the addition, one in the large room and one in the bedroom.

7. The Respondent, through a sub-contractor, J.L. Boyer Heating & Air Conditioning, installed identical Sanyo wall-mounted HVAC units rated at 9,000 BTUs (British thermal units) in each room.

8. The Sanyo HVAC units do not provide adequate heat and air conditioning in either room.

9. The Claimant rejected a proposal by the Respondent to install auxiliary baseboard heating units in the two rooms for an additional \$2,700.00.

10. The Claimant received two proposals for replacing the inadequate HVAC units with larger capacity units. Both proposals were for \$8,000.00.

DISCUSSION

A home owner may recover compensation from the Guaranty Fund "for an actual loss that results from an act or omission by a licensed contractor..." Md. Code Ann., Bus. Reg. § 8-405 (2004). An "actual loss" is defined as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2004). The claimant (owner) has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2004). As explained below, the Claimant has established that the Respondent performed an inadequate home improvement. Md. Code Ann., Bus. Reg. §8-605(1) (2004).

The home-improvement contract provided for two wall-mounted HVAC units to be installed in the addition, one in the large room and one in the bedroom. The contract did not specify the brand or capacity of the HVAC units, but as a practical matter, it is only reasonable to read the contract as containing an implied condition that the HVAC units will supply adequate heat and air conditioning. The Claimant testified credibly that the HVAC units do not provide adequate heat in either room, and that the units run constantly while providing air conditioning, an indication that the units are inefficient. Additionally, the Claimant presented a letter from UBuildIt, a home-improvement consultant, and proposals from two HVAC contractors, all of which indicated that the HVAC units installed by the Respondent were inadequate. According to the proposals, the large room requires at least 15,000 BTUs and the bedroom at least 12,000 BTUs. Both proposals quoted a total price of \$8,000.00.

The Claimant and the Respondent discussed the inadequacy of the HVAC units. The Respondent offered to install auxiliary baseboard heating units in the two rooms for an additional \$2,700.00. The Claimant rejected this offer, and I find that the Claimant acted reasonably in

doing so. The Respondent attempted to blame the HVAC subcontractor and the Claimant for the inadequate HVAC units. The Respondent indicated that the HVAC subcontractor presented two proposals, one of which included auxiliary heat for an additional \$1,375.00, and noted that the higher priced unit could have been installed if the Claimant had authorized it on a change order and paid the difference in price. The Claimant, however, was never presented with the proposal for auxiliary heat, and therefore had no opportunity to evaluate the proposal or the true HVAC requirements. The Respondent concluded by stating that he installed a heat pump as required by the contract. As noted above, I find that the contract required the installation of adequate HVAC units. The evidence establishes that the Respondent knew at the time of installation that the 9,000 BTU HVAC units would not provide adequate heat. The Respondent also should have known that the two rooms, being of very different dimensions, would require different capacity HVAC units.

The Award From the Fund

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

The formula set out in section (c) adequately addresses the circumstances of this case.

Amount Claimant Paid to Respondent Under the Original Contract	\$111,003.00
Plus Amount Due to New Contractor	<u>\$8,000.00</u> \$119,003.00
Less Amount of Original Contract Actual Loss	<u>\$111,003.00</u> \$8,000.00

The total amount of the Claimant's compensable loss from the Fund is \$8,000.00, the cost to install adequate HVAC units as provided for in the home-improvement contract.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant sustained an actual loss of \$8,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004)

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:


ORDER that the Claimant be awarded \$8,000.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent remain ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, Md. Code Ann., Bus. Reg. § 8-411 (2004); and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

September 29, 2008
Date mailed

#100079



Robert F. Barry
Administrative Law Judge

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 4th day of December 2008, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Andrew Snyder

*Andrew Snyder
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION