



STATE OF MARYLAND
DLLR

DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
 500 N. Calvert Street, Room 306
 Baltimore, MD 21202-3651
 Stanley J. Botts, Commissioner

IN THE MATTER OF ERIK BARVIR * MARYLAND HOME
 AND THE CLAIM OF * IMPROVEMENT COMMISSION
 ALBERT SECKINGER *
 AGAINST THE MARYLAND *
 HOME IMPROVEMENT GUARANTY * MHIC CASE NO. 08 (90) 1862
 FUND *

* * * * *

FINAL ORDER

WHEREFORE, this 22ND day of February, 2011, Panel B of the Maryland Home Improvement Commission ORDERS that:

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

B) The Administrative Law Judge found that the Claimant paid a total of \$7,548.90 to the Respondent. Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the Commission may not award more than \$7,548.90 to the Claimant.

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MARTIN O'MALLEY, GOVERNOR • ANTHONY G. BROWN, LT. GOVERNOR • ALEXANDER M. SANCHEZ, SECRETARY

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3) **The Recommended Order of the Administrative Law Judge is Amended as follows:**

A) **The Claimant is Awarded \$7,548.90 from the Home Improvement Guaranty Fund.**

B) **Pursuant to Business Regulation Article, §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall then be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall also be liable for 10% annual interest on any unreimbursed balance owed to the Fund.**

C) **The Civil Penalty of \$1,250.00 imposed on the Respondent is Affirmed.**

4) **This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

I. Jean White

Chair - Panel B

MARYLAND HOME IMPROVEMENT
COMMISSION

THE MARYLAND HOME	* BEFORE ROBERT F. BARRY,
IMPROVEMENT COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
ERIK BARVIR,	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* OAH No.: DLR-HIC-04-10-13156
AND THE CLAIM OF	* MHIC No.: 08 (90) 1862
ALBERT SECKINGER	*
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
* * * * *	* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On March 24, 2008, Albert J. Seckinger (Claimant) filed a complaint with the Maryland Home Improvement Commission (MHIC) against Eric Barvir (Respondent), a licensed home-improvement contractor, and his company, Apex General Contractor, LLC, also a licensed home-improvement contractor. On April 12, 2010, the MHIC filed a Statement of Charges against the Respondent, charging him with violations of Maryland's home-improvement laws. Md. Code Ann., Bus. Reg. §§ 8-311(a)(10), 8-501(c)(1)(viii), and 8-611(1) (2010).

On October 20, 2008, the Claimant filed a claim against the MHIC Guaranty Fund (Fund) for reimbursement of \$23,014.89 for actual losses allegedly suffered as a result of home-improvement contracts with the Respondent.

I held a hearing on June 4, 2010 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031, on both the administrative charges and the claim against the Fund. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). Jessica Berman Kaufman, Assistant Attorney General, represented the MHIC. The Claimant represented himself. The Respondent represented himself. Susan Cherry, Assistant Attorney General, represented the Fund.

The contested-case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01, and 28.02.01.

ISSUES

1. Did the Respondent use a contract form that did not contain information required by law?
2. Did the Respondent perform an unworkmanlike, inadequate and/or incomplete home improvement, thereby demonstrating a lack of competence?
3. Did the Respondent violate a building law of a State or a political subdivision of a State?
4. If the answer to any of the three questions above is yes, what sanctions and/or penalties are appropriate? and
5. Did the Claimant sustain an actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted eight exhibits on behalf of the MHIC:

- MHIC #1 - Notice of Hearing:
Memorandum, May 11, 2010, concerning unclaimed certified mail receipt;
Statement of Charges and Order for Hearing, April 12, 2010
- MHIC #2 - Respondent's MHIC licensing history, May 12, 2010
- MHIC #3 - Contract between the Claimant and the Respondent, January 23, 2008
- MHIC #4 - Contract between the Claimant and the Respondent, January 23, 2008
- MHIC #5 - Photocopies of canceled checks, numbers 0909, 0910, 0914, and 0915
- MHIC #6 - Complaint, number 08-1862, received March 24, 2008, with attached contract;
Complaint, number 08-1863, with attached contract;
Receipts: Lowe's, January 29, 2008, and The Home Depot, February 12, 2008 and February 13, 2008
- MHIC #7 - Letter, March 30, 2009, from Hubert Lowery, Investigator, MHIC, to Frank Kaiss III
- MHIC #8 - Inspection Report, Frank J. Kaiss & Associates, April 10, 2009, with attachments:
- Enclosure #1 - Cost Estimate
 - Enclosure #2 - Cost Estimate
 - Enclosure #3 - Cost Estimate
 - Resumé of Mr. Kaiss
 - Photocopies of twenty-two photographs taken by Mr. Kaiss
 - Twenty-two photographs taken by Mr. Kaiss
 - Ten photographs taken by the Claimant

I admitted (except as noted) the following exhibits on behalf of the Claimant:

- CLAIM #1 - Two photographs
- CLAIM #2 - Two photographs
- CLAIM #3 - Two photographs
- CLAIM #4 - Two photographs
- CLAIM #5 - Two photographs
- CLAIM #6 - Eleven photographs
- CLAIM #7 - Two pieces of mitred hardwood maple crown molding
- CLAIM #8 - Two photographs
- CLAIM #9 - Two photographs
- CLAIM #10 - Two photographs
- CLAIM #11 - Two photographs
- CLAIM #12 - Two photographs
- CLAIM #13 - Two photographs
- CLAIM #14 - (Due to my clerical error, there was no #14)
- CLAIM #15 - Two photographs
- CLAIM #16 - Two photographs
- CLAIM #17 - Seven photographs
- CLAIM #18 - Two photographs
- CLAIM #19 - Two photographs
- CLAIM #20 - Four photographs
- CLAIM #21 - Two photographs
- CLAIM #22 - Two photographs
- CLAIM #23 - Two photographs

CLAIM #24 - Six photographs

CLAIM #25 - Two photographs

CLAIM #26 - Two photographs

CLAIM #27 - Two photographs

CLAIM #28 - Description of Proposed Work, Proposals A and B, DRD Group

CLAIM #29 - Description of Proposed Work, Proposal B, DRD Group

CLAIM #30 - Construction Contract, Starcom Design/Build Corp.

CLAIM #31 - Construction Contract, Starcom Design/Build Corp.

CLAIM #32 - Cost estimate for crown molding, KraftMaid Cabinetry, June 3, 2010

CLAIM #33 - Quote, The Home Depot, June 3, 2010

CLAIM #34 - (not admitted) Order, Next Day Blinds, May 19, 2010

CLAIM #35 - Invoice, Ideal Tile, February 9, 2008

CLAIM #36 - Invoice, Morris Tile Distributors, October 31, 2007

CLAIM #37 - Invoice, Morris Tile Distributors, November 16, 2007

CLAIM #38 - Invoice, Morris Tile Distributors, February 7, 2008

CLAIM #39 - Invoice, Morris Tile Distributors, October 31, 2007

CLAIM #40 - Quote, Lowe's, October 20, 2007

CLAIM #41 - Three photographs

CLAIM #42 - Four photographs

CLAIM #43 - One photograph

CLAIM #44 - One photograph

CLAIM #45 - Invoice, The Home Depot, December 18, 2007

CLAIM #46 - Invoice, The Home Depot, December 12, 2007

CLAIM #47 - One photograph

CLAIM #48 - One photograph

CLAIM #49 - One photograph

CLAIM #50 - One photograph

CLAIM #51 - One photograph

CLAIM #52 - One photograph

CLAIM #53 - (not admitted) CD-ROM of answering machine messages

I admitted one exhibit on behalf of the Fund:

FUND #1 - Letter, October 31, 2008, from John Borz, Chairman, MHIC, to the Respondent, with attached Home Improvement Claim Form:

Copy of letter, March 30, 2009, from Hubert Lowery, Investigator, MHIC, to Frank Kaiss III;

Copy of letter, May 15, 2009, from Hubert Lowery, Investigator, MHIC, to the Respondent

The Respondent did not submit any exhibits.

Testimony

The MHIC presented the testimony of the Claimant, and Frank J. Kaiss III, who I accepted as an expert witness in home-improvement, home inspection, and estimation of construction costs.

The Respondent testified on his behalf, and presented testimony from Tommy Plunkert.¹

The Claimant also testified on behalf of his claim against Fund.²

The Fund did not present any witnesses.

¹ The Respondent had a subpoena issued for George Easterday, a former employee or sub-contractor of the Respondent, who was to testify about the installation of flooring. Mr. Easterday did not appear.

² The Claimant had subpoenas issued for Mr. Lowery of the MHIC, Jonathan Plunkert, and Shelly Wiley, the Claimant's fiancé. John Plunkert did not appear. Mr. Lowery appeared, but apparently left before the end of the hearing. I ruled that Ms. Wiley's testimony would have been cumulative, and I prohibited her from testifying

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor/salesman under MHIC registration number 01-95251. (MHIC #2).
2. At all times relevant to the subject of this hearing, the Respondent was the individual in responsible charge of the home improvement work of Apex General Contracting, LLC, or Apex Contracting, LLC³, which held a corporate home improvement contractor and salesman license under MHIC registration number 05-127222. (MHIC #2).
3. At all times relevant to the subject of this hearing, the Claimant lived at 8961 Blue Pool, Columbia, Maryland 21045, in a single-family, two-story house with a finished basement.
4. The Claimant had previously used an unlicensed home-improvement contractor to do renovations on his home. Because of that contractor's work, the Claimant's home suffered water damage, for which the Claimant received an insurance settlement from his homeowner's insurance company.
5. On January 23, 2008, the Claimant and the Respondent entered into two home improvement contracts. (MHIC #3 and #6).
6. Both contracts contained the Respondent's MHIC individual registration number, but they did not contain: (a) the MHIC's telephone number; (b) a statement that each contractor and each subcontractor must be licensed by the MHIC; and (c) a statement that anyone may ask the MHIC about a contractor or subcontractor.
7. The first contract provided that the Respondent would complete work on the first

³ The Respondent changed the name of the company from Apex General Contracting, LLC to Apex Contracting, LLC, effective, April 29, 2009.

floor of the Claimant's home, including the kitchen, dining room, and a bathroom, for \$7,925.00. (MHIC #3).

8. The scope of work for the first contract was described as follows:

- Remove and reinstall kitchen cabinets (base and wall units), install countertops
- Hang and finish uncompleted and damaged drywall
- Prime finished drywall, paint kitchen and dining room (ceiling, walls and trim)
- Remove tile from powder room and hallway to step
- Remove and replace damaged subfloor under-laminate (material supplied by Apex)
- Install laminate flooring in kitchen, dining room and hallway to step and powder room
- Install all kitchen appliances
- Troubleshoot and finish electrical in kitchen
- Hook up kitchen sink/garbage disposal and dishwasher, remove and install toilet, remove and install vanity
- Install crown molding in kitchen and dining room, install new base molding in kitchen and dining room (Apex to supply base molding); install bi-fold door supplied by homeowner

9. On January 23, 2008, the Claimant paid the Respondent a deposit of \$3,950.00 for the first contract.

10. The second contract provided that the Respondent would complete work on a second floor bathroom for \$2,575.00.

11. The scope of work for the second contract was described as follows:

- Finish uncompleted tile and frame-in for shower door
- Finish all unfinished drywall

- Prime finished drywall, paint bathroom and closet (ceilings, walls and trim)
- Set tub, toilet, vanity top and fixture, and trim-out shower
- Set two swing doors, one pocket door, miscellaneous casing and base; install ventilated shelving
- Install shower door

12. On January 23, 2008, the Claimant paid the Respondent a deposit of \$1,275.00 for the second contract.

13. The Respondent performed work on the two contracts between January 23, 2008 and February 16, 2008.

14. The Respondent did not remove water-damaged sub-flooring. (CLAIM #1 and #2).

15. The Respondent, after discussing with the Claimant the inappropriateness of using hardwood maple crown molding, rather than pine, installed hardwood maple crown molding in the kitchen and dining room, with very poorly mitred, uneven, and unsightly joints. (CLAIM # 6).

16. The Respondent installed base molding in the kitchen that was uneven and that did not cover the entire baseboard. (CLAIM # 8).

17. The Respondent installed laminate flooring in the dining room that was uneven. (CLAIM #5).

18. The Respondent installed a kitchen sink that had a significant gap between the sink and the Formica countertop, which allowed water to leak behind the sink. (CLAIM #16).

19. The Respondent did not install a transition strip between the kitchen and dining room, leaving an uneven transition between the two rooms. (MHIC #8).

20. The Respondent directly wired the electrical feed to the microwave oven/stove (oven) instead of using a plug to connect the oven to an electrical outlet. Additionally, the

Respondent vented the oven to an interior charcoal filter instead of to the outside. The oven did not ventilate correctly, causing water vapor to build up on the interior and exterior of the oven. (CLAIM #13).

21. In the upstairs bathroom, the Respondent attempted to complete tile work that had been started by the unlicensed contractor. The Respondent installed travertine marble on the floor that was set unevenly and was set with the incorrect adhesive, mastic rather than thinset. The ceramic tile on the walls was set improperly; it is not square, contains gaps and is incomplete. (MHIC #8, CLAIM #23). The tile framing of the bath tub is also uneven and incomplete. (CLAIM ##18, 19, 20, and 25).

22. On February 16, 2008, the Claimant and the Respondent entered into an addendum to have the Respondent install a sink in the upstairs powder room for \$323.90 in labor and materials. On that same date, the Claimant paid the Respondent the \$323.90, plus an additional \$2,000.00 on the original contracts.

23. The Respondent installed a sink in the upstairs powder room that does not drain properly; water accumulates in the basin. (MHIC #8).

24. The Respondent did not obtain permits or inspections for electrical or plumbing work.

25. In late February or early March, 2008, the Respondent left a voice-mail message for the Claimant in which the Respondent blamed the Claimant for not having materials available as promised. The Respondent stated that he would not return to the job.

26. The Complainant obtained two estimates to redo everything included in the two contracts.

27. The DRD Group estimated that the first contract would cost \$8,625.00 and the second contract \$9,300.00, a total of \$17,925.00. (CLAIM ##28-29).

28. The Starcom Design/Build Corp. estimated that the first contract would cost \$12,602.00 and the second contract \$13,514.00, a total of \$26,116.00. (CLAIM ##30-31).

29. The Claimant obtained an estimate of \$2,976.30⁴ for new crown molding. (CLAIM #32).

30. The Claimant obtained an estimate of \$2,986.86⁵ for new sub-flooring, underlayment, flooring, and other materials needed to complete the contracts. With sales tax of \$179.22 and a curbside delivery charge of \$75.00, the total estimate was \$3,241.08. (CLAIM #33).

31. The Claimant paid a total of \$2,406.21 for the tile used on the home-improvement project. (CLAIM ## 35-39)

32. Frank J. Kaiss III is a general contractor with forty years experience in the construction industry, including home-improvement, inspections, and cost estimating.

33. On April 6, 2009, Mr. Kaiss inspected the work performed by the Respondent at the Claimant's home. Mr. Kaiss issued a report and opined that all of the work performed by the Respondent was unworkmanlike and had to be totally redone. (MHIC #8).

DISCUSSION

A. Administrative Charges

The MHIC has the burden of proof to demonstrate, by a preponderance of the evidence, that the Respondent committed the violations contained in its Statement of Charges. Md. Code Ann., State Gov't 10-217 (2009); *Comm'r of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996).

⁴ The actual estimate of \$3,769.98 was for thirty-eight pieces of molding. At the hearing, the Claimant testified that the correct number of pieces was thirty. I adjusted the cost.

⁵ The actual estimate included a charge of \$309.60 for 20 boxes of contractor bags. At the hearing, the Claimant testified that the correct number of boxes was two. I adjusted both the cost of the two boxes and the related sales tax.

The MHIC charged the Respondent with using home-improvement contracts that did not contain statutorily-required information: (a) the MHIC's telephone number; (b) a statement that each contractor and each subcontractor must be licensed by the MHIC; and (c) a statement that anyone may ask the MHIC about a contractor or subcontractor. *See*, Md. Code Ann., Bus. Reg. § 8-501(c)(1)(viii) (2010). The Respondent admitted that the contracts did not contain the required information, and therefore that he was in violation of section 8-501(c)(1)(viii). I find that the MHIC has sustained its burden to prove violations of section 8-501(c)(1)(viii).

The MHIC charged the Respondent with violating a building law of Howard County. *See*, Md. Code Ann., Bus. Reg. § 8-611(1) (2010). The MHIC did not present any specific part of the Howard County Building Code to support this charge. Mr. Kaiss testified that permits and inspections are required for plumbing and electrical work. The Respondent testified that permits and inspections are not required for plumbing and electrical work that is replacement rather than original work. Because the MHIC did not present the specific Howard County building code that could resolve this difference of opinion, I find that the MHIC has failed to meet its burden on this issue; therefore the Respondent did not violate this subsection.

The MHIC charged the Respondent with lacking competence, as shown by the performance of an unworkmanlike, inadequate, or incomplete home improvement. *See*, Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2010). For the reasons discussed below, I find that the MHIC has sustained its burden to prove a violation of section 8-311(a)(10). (This same discussion will also establish the merit of the claim against the Fund for inadequate, unworkmanlike, and incomplete home-improvement work.)

Unworkmanlike, inadequate, or incomplete home improvement

The Claimant was not satisfied with any aspect of the Respondent's work; his complaint and his claim against the Fund encompassed literally everything in the two contracts, including the

kitchen sink. Mr. Kaiss, the expert in home-improvement, opined that the Respondent's workmanship was generally poor, and essentially had to be totally redone. The Respondent attempted to deflect blame by arguing that the Claimant was to blame for the problems with the home-improvement project. According to the Respondent: (1) the Claimant's budget was limited to the amount he received from his homeowner's insurance claim; (2) the Claimant failed to have materials on hand as promised; and (3) the Claimant insisted on using the incorrect type of wood for the crown molding. As explained below, I find that the evidence overwhelmingly supports the charge of incompetence due to an unworkmanlike, inadequate, or incomplete home improvement. The evidence does not support the Respondent's assertions that materials were not available or that the Claimant was operating on a specific budget. There was evidence presented that the wrong wood was used for crown molding, but that error does not excuse the poor workmanship performed by the Respondent.

First contract - sub-flooring

The first contract provided that the Respondent would remove and replace the water-damaged plywood sub-flooring and particle board underlayment in the kitchen and dining room, and then install new sub-flooring, underlayment, and laminate flooring. The Claimant suspected that the Respondent had not replaced the water-damaged sub-flooring and underlayment because the Respondent was able to complete the flooring very quickly. The Claimant exposed portions of the floor where a heat register had been cut out and in another corner area of the floor, to expose the underlayment and sub-flooring. In his report, Mr. Kaiss wrote that he could not observe any rotten sub-flooring in the areas cut out by the Claimant. At the hearing, however, Mr. Kaiss viewed photographs presented by the Claimant and agreed that the photographs showed the underlayment and sub-flooring, and that the plywood sub-flooring looked swollen and flaky, as if it had absorbed water. (CLAIM #1 and #2). The Respondent did not deny that his employees may not have replaced

all, or even any, of the damaged underlayment and sub-flooring; he said that without removing the entire floor, it was impossible to know what, if any, part of the sub-flooring had been replaced. Having viewed the relevant photographs, I find it much more likely than not that the Respondent failed to replace the damaged sub-flooring.

Mr. Kaiss also noted that there was a “marked difference in the sub-floor height between the dining room and the kitchen floors installed by the Respondent.” (MHIC #8). At the hearing, he agreed with the Claimant that the floors were so uneven that they were “wavy.” I find that the respondent installed the flooring in an incompetent manner.

First contract - crown molding

The Claimant, Mr. Kaiss, and the Respondent all concurred that the Respondent’s work on the crown molding was unworkmanlike. The Claimant’s photographs show portions of the crown molding not flush with the wall and ornamental grooves in the crown molding that do not mesh between sections. Mr. Kaiss observed that “[m]itre joints at base and crown molding in the kitchen and dining room are sloppy.” (MHIC #6). Even the Respondent acknowledged that the crown molding joints were “horrible.”

The Respondent testified that the Claimant insisted on using an improper type of wood for the crown molding, a hardwood maple instead of a softer pine. The Respondent claimed that that he strongly advised the Claimant against using the hardwood maple, and even pointed out that, besides the inappropriateness of the type of wood, it was unusual, as requested by the Claimant, to paint the expensive maple hardwood. Tommy Plunkert testified that the maple hardwood was difficult to work with; it was difficult to mitre and difficult to install flush with the wall. Mr. Plunkert suggested, without any evidence, that the wood and walls themselves were uneven. The Respondent is undoubtedly correct that pine was a better option for the crown molding. He claimed that he did the best he could with the materials provided by the Claimant. I have some sympathy with the

Respondent's position. From my experience with the Claimant at the hearing, he certainly can be headstrong, and I have no doubt that he insisted on using the incorrect type of wood. Nevertheless, the Respondent agreed in the contract to install crown molding provided by the Claimant, and that crown molding was installed in a very unworkmanlike manner.

First contract - Oven

Mr. Kaiss testified that the Respondent installed the microwave oven incorrectly because "the electrical feed to the stove has been directly wired, [without] a plug installed per code." (MHIC #8). The Claimant said that the oven shorted out and did not vent correctly. The Respondent indicated that the oven was made to be hard-wired because it came without a plug, to which Mr. Kaiss responded that a device, known as a "pigtail," can be used to attach a plug to the oven cord. I accept Mr. Kaiss's testimony as more persuasive than the Respondent's. The oven should not have been hard-wired. The Respondent vented the oven to an interior charcoal filter, instead of to the outside. The oven did not ventilate correctly, causing water vapor to appear on the interior and exterior of the oven. Mr. Kaiss agreed with the Respondent generally that interior venting is an appropriate building method, but that once it was clear that the interior venting was not working, exterior venting was the appropriate method. The Respondent also argued that the first contract did not require exterior venting, which would require more extensive work, including the cutting of exterior siding. The first contract, however, required the Respondent to install (competently) all kitchen appliances, including the oven, which the Respondent did not do.

First contract - Kitchen Sink

The first contract, in part, required the Respondent to hook up a kitchen sink. The Respondent installed a sink that had a significant gap between the sink and the Formica countertop, which allowed water to leak behind and under the sink. (CLAIM #16). The Respondent agreed that the sink was improperly installed, either due to a too large cutout for the

sink, or misplacement of the sink. The Respondent suggested that the sink could easily be repaired by being reset. I find it more likely that the countertop will have to be replaced due to the Respondent making a too large cutout. If the sink could have easily been reset, I would expect the Respondent to have done so before leaving the Claimant's home.

Second contract – bathroom tile

The second contract required the Respondent to finish work begun on the second-floor bathroom, specifically: to complete tile flooring and walls; build a frame-in for a shower; finish all unfinished drywall; prime finished drywall; paint bathroom and closet; set tub, toilet, vanity top and fixture; and trim-out shower. The Respondent installed travertine marble on the floor that was set unevenly and set with the incorrect adhesive, mastic rather than thinset. The ceramic tile on the walls was set improperly: it is not square, contains gaps, and is incomplete. The tile framing of the bath tub is also uneven and incomplete. The photographs reflect the very poor results of the Respondent's work on the second-floor bathroom. The Respondent argued that he did not perform some of the work that is shown in the photographs, that it was the work of the unlicensed contractor who had previously worked on the Claimant's home. The Respondent was aware when he contracted with the Claimant that he was going to be completing some work started by another contractor. He agreed to complete the bathroom in a competent manner, which he did not do, and he is responsible for the current unsightly condition of the bathroom.

Addendum – Powder Room

The Respondent installed a sink in the upstairs powder room that does not drain properly; water accumulates in the basin. The Respondent argued, unconvincingly, that there was possibly a problem with the sink. I find it much more likely that the sink was installed improperly.

Other Matters

The Claimant cited many other problems with the Respondent's work. The discussion above covers most of the significant examples of the Respondent's unworkmanlike performance. At the hearing, the Respondent argued, in part, that his poor work was a result of the Claimant's supposed limited budget. The Respondent, however, had a duty to perform competent work no matter what the Claimant's financial situation was. The Respondent also argued that he was justified in leaving the home-improvement contracts incomplete because the Claimant did not have materials on hand. On this issue, I do not find the Respondent to be credible. The Claimant's testimony, photographs, and receipts abundantly proved that the Claimant had all materials (except cabinets that were on order) in his house and ready to be installed or used on the project.

B. Penalties

Because two of the charged violations have been proven, the Respondent is subject to sanctions and/or a civil penalty, in the MHIC's discretion. Md. Code Ann., Bus. Reg. §§ 8-311 and 8-620. The civil penalty may not exceed \$5,000.00 per violation, and the following factors shall be considered by the MHIC in assessing a penalty:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the complainant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

Md. Code Ann., Bus. Reg. § 8-620(b).

For the administrative violations, the MHIC recommended a reprimand, as permitted by section 8-311(a). The MHIC argued that this sanction was justified even though the Respondent had no prior violations. The MHIC argued that violations here were serious, especially the incompetent

work, that the Respondent showed a lack of good faith by abandoning the contracts and not properly supervising his employees and sub-contractors, and that his actions had a harmful effect on the home-improvement industry. I concur. Additionally, the Respondent did not comply with the most rudimentary regulatory requirements concerning the contents of a home improvement contract.

With regard to civil penalties, the MHIC recommended the following: for the violation of section 8-311(a)(10) (lack of competence), \$1,000.00; for the violation of section 8-501(c)(1)(viii) (required contract provisions), \$250.00. The MHIC again emphasized the seriousness of the violations, the relative absence of good faith by the Respondent, and the harmful effect of the violations on the Claimant, the public, and the business of home improvement. The MHIC did not offer evidence as to the Respondent's assets. I find the MHIC's recommendations to be reasonable. Therefore, I recommend that the Respondent be assessed a civil penalty in the total amount of \$1,250.00.

C. Fund Claim

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor...." Md. Code Ann., Bus. Reg. § 8-405(a) (2010), COMAR 09.08.03.03B(2). Actual loss "means 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 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation. First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract. Second, the Respondent performed an inadequate, unworkmanlike, or incomplete home improvement. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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 and complete 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 measurement accordingly.

COMAR 09.08.03.03B(3). In this case, the appropriate formula is the one found in COMAR 09.08.03.03B(3)(c).

The computation under COMAR 09.08.03.03B(3)(c) is then as follows:

Amount paid to the Respondent:	\$7,548.90
Plus	
The labor to complete the contract	+ <u>\$17,925.00</u>
	\$25,473.90
Plus cost of new materials	<u>\$8,369.37</u>
	\$33,843.27
Less	
Original Contract	<u>\$10,823.90</u>
	\$23,019.17

In conclusion, based on the testimony and documentary evidence submitted, I find that the Claimant has sustained his burden of proof and that the actual loss he suffered is \$23,019.17. The maximum amount recoverable from the Fund is \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e).

CONCLUSIONS OF LAW

I conclude that the Respondent did not violate a building law of a State or a political subdivision of a State. Md. Code Ann., Bus. Reg. § 8-611(1) (2010).

I further conclude that the Respondent violated Maryland home improvement law. Md. Code Ann., Bus. Reg. §§ 8-311(a)(10) (lack of competence) and 8-501(c)(1)(viii) (required contract provisions). The Respondent is subject to sanction and civil penalties. Md. Code Ann., Bus. Reg. §§ 8-311(a) and (c) and 8-620 (2010);

I further conclude that the Claimant has sustained an actual loss of \$23,019.17 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Respondent did not violate a building law of a State or a political subdivision of a State;

ORDER that the Respondent violated section 8-311(a)(10) by performing an unworkmanlike, inadequate and/or incomplete home improvement, thereby demonstrating a lack of competence; and section 8-501(c)(1)(viii) by using a contract form that did not contain information required by law;

ORDER that the Respondent receive a reprimand; and


ORDER that the Respondent pay a civil penalty of \$1,250.00, pursuant to Md. Code Ann., Bus. Reg. § 8-620 (2010), and pay the amount of this civil penalty to the Maryland Home Improvement Commission within thirty days of the adoption of this Recommended Order by the Maryland Home Improvement Commission; and

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent is 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 Maryland Home Improvement Commission; Md. Code Ann., Bus. Reg. § 8-411 (2010), and

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

August 31, 2010
Date Decision Mailed


Robert F. Barry
Administrative Law Judge

RFB/te
#114908

THE MARYLAND HOME	* BEFORE ROBERT F. BARRY,
IMPROVEMENT COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
ERIK BARVIR,	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* OAH No.: DLR-HIC-04-10-13156
AND THE CLAIM OF	* MHIC No.: 08 (90) 1862
ALBERT SECKINGER	*
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
* * * * *	* * * * *

FILE EXHIBIT LIST

Exhibits

I admitted eight exhibits on behalf of the MHIC:

- MHIC #1 - Notice of Hearing;
Memorandum, May 11, 2010, concerning unclaimed certified mail receipt;
Statement of Charges and Order for Hearing, April 12, 2010
- MHIC #2 - Respondent's MHIC licensing history, May 12, 2010
- MHIC #3 - Contract between the Claimant and the Respondent, January 23, 2008
- MHIC #4 - Contract between the Claimant and the Respondent, January 23, 2008
- MHIC #5 - Photocopies of canceled checks, numbers 0909, 0910, 0914, and 0915
- MHIC # 6 - Complaint, number 08-1862, received March 24, 2008, with attached contract;
Complaint, number 08-1863, with attached contract;
Receipts: Lowe's, January 29, 2008, and The Home Depot, February 12, 2008
and February 13, 2008

MHIC #7 - Letter, March 30, 2009, from Hubert Lowery, Investigator, MHIC, to Frank Kaiss III

MHIC #8 - Inspection Report, Frank J. Kaiss & Associates, April 10, 2009, with attachments:

- Enclosure #1 - Cost Estimate
- Enclosure #2 - Cost Estimate
- Enclosure #3 - Cost Estimate
- Resumé of Mr. Kaiss
- Photocopies of twenty-two photographs taken by Mr. Kaiss
- Twenty-two photographs taken by Mr. Kaiss
- Ten photographs taken by the Claimant

I admitted (except as noted) the following exhibits on behalf of the Claimant:

CLAIM #1 - Two photographs

CLAIM #2 - Two photographs

CLAIM #3 - Two photographs

CLAIM #4 - Two photographs

CLAIM #5 - Two photographs

CLAIM #6 - Eleven photographs

CLAIM #7 - Two pieces of mitred hardwood maple crown molding

CLAIM #8 - Two photographs

CLAIM #9 - Two photographs

CLAIM #10 - Two photographs

CLAIM #11 - Two photographs

CLAIM #12 - Two photographs

CLAIM #13 - Two photographs

CLAIM #14 - (Due to my clerical error, there was no #14)

CLAIM #15 - Two photographs

CLAIM #16 - Two photographs

CLAIM #17 - Seven photographs

CLAIM #18 - Two photographs

CLAIM #19 - Two photographs

CLAIM #20 - Four photographs

CLAIM #21 - Two photographs

CLAIM #22 - Two photographs

CLAIM #23 - Two photographs

CLAIM #24 - Six photographs

CLAIM #25 - Two photographs

CLAIM #26 - Two photographs

CLAIM #27 - Two photographs

CLAIM #28 - Description of Proposed Work, Proposals A and B, DRD Group

CLAIM #29 - Description of Proposed Work, Proposal B, DRD Group

CLAIM #30 - Construction Contract, Starcom Design/Build Corp.

CLAIM #31 - Construction Contract, Starcom Design/Build Corp.

CLAIM #32 - Cost estimate for crown molding, KraftMaid Cabinetry, June 3, 2010

CLAIM #33 - Quote, The Home Depot, June 3, 2010

CLAIM #34 - (not admitted) Order, Next Day Blinds, May 19, 2010

CLAIM #35 - Invoice, Ideal Tile, February 9, 2008

- CLAIM #36 - Invoice, Morris Tile Distributors, October 31, 2007
 - CLAIM #37 - Invoice, Morris Tile Distributors, November 16, 2007
 - CLAIM #38 - Invoice, Morris Tile Distributors, February 7, 2008
 - CLAIM #39 - Invoice, Morris Tile Distributors, October 31, 2007
 - CLAIM #40 - Quote, Lowe's, October 20, 2007
 - CLAIM #41 - Three photographs
 - CLAIM #42 - Four photographs
 - CLAIM #43 - One photograph
 - CLAIM #44 - One photograph
 - CLAIM #45 - Invoice, The Home Depot, December 18, 2007
 - CLAIM #46 - Invoice, The Home Depot, December 12, 2007
 - CLAIM #47 - One photograph
 - CLAIM #48 - One photograph
 - CLAIM #49 - One photograph
 - CLAIM #50 - One photograph
 - CLAIM #51 - One photograph
 - CLAIM #52 - One photograph
 - CLAIM #53 - (not admitted) CD-ROM of answering machine messages
- I admitted one exhibit on behalf of the Fund:
- FUND #1 - Letter, October 31, 2008, from John Borz, Chairman, MHIC, to the Respondent, with attached Home Improvement Claim Form;
 - Copy of letter, March 30, 2009, from Hubert Lowery, Investigator, MHIC, to Frank Kaiss III;

Copy of letter, May 15, 2009, from Hubert Lowery, Investigator, MHIC,
to the Respondent

The Respondent did not submit any exhibits.

PROPOSED ORDER

WHEREFORE, this 5th day of October 2010, 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION