

IN THE MATTER OF THE CLAIM	* BEFORE HENRY R. ABRAMS,
OF DEVRA Y. MOULTON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-08997
FOR THE ALLEGED ACTS OR	* MHIC NO.: 09 (90) 1212
OMISSIONS OF GEORGE A. SYKES,	*
T/A G A S CONSTRUCTION	*
SERVICES,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On August 3, 2011, Devra Y. Moulton (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,294.10 for actual losses allegedly arising from the performance a home improvement contract with George A. Sykes, trading as G A S Construction Services (together, Respondent).

I held two days of hearing, on July 31, 2013 and August 5, 2013, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road in Hunt Valley, MD 21031. Md. Code

Ann., Bus. Reg. §§ 8-312, 8-407 (2010 and Supp. 2013); Code of Maryland Regulations (COMAR) 09.01.03.03.¹

Kris King, Assistant Attorney General, Department of Labor, Licensing, and Regulation (DLLR), represented the Fund. The Claimant represented herself. Carole Jeffries, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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 & Supp. 2013); COMAR 09.01.03.01; 09.08.02.01; and 28.02.01.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

CL Ex. 1 – September 15, 2005 Deficiency List from the Baltimore County Office of Community Conservation, Housing Opportunities Programs re: the Claimant's home (with handwritten notes)

CL Ex. 1A – October 26, 2007 contract between the Claimant and the Respondent for \$26,487.00 (with interlineations)

CL Ex. 2 – Undated Respondent's Improvements Bid –List estimate (with handwritten notes)

CL Ex. 3 – The Claimant's undated photograph of the Claimant's home's living room window

CL Ex. 3A – The Claimant's undated photograph of the Claimant's home's shuttered attic fan

CL Ex. 4 – The Claimant's undated photograph of the location of outside storage units on the Claimant's driveway

¹ Unless otherwise indicated, Title 8, Subtitle 4 of the Business Regulations article, as amended from time to time, shall be referred to as the Act.

- CL Ex. 5 – The Claimant’s undated photograph of the Claimant’s driveway showing filled-in cracks
- CL Ex. 6 – The Claimant’s undated photograph of a portion of the Claimant’s home’s gutter and downspout
- CL Ex. 7 – The Claimant’s undated photograph of the Claimant’s home’s basement window
- CL Ex. 8 – The Claimant’s undated photograph of the Claimant’s home’s basement showing exposed electrical cables
- CL Ex. 9 – The Claimant’s undated photograph of the Claimant’s home’s basement showing exposed electrical cords
- CL Ex. 10 – The Claimant’s undated photograph of the Claimant’s home’s patched basement ceiling
- CL Ex. 11 – The Claimant’s undated photograph of the Claimant’s home’s basement ceiling showing enclosed ductwork
- CL Ex. 11A – The Claimant’s undated photograph of the interior of the Claimant’s home’s basement closet showing sump pump
- CL Ex. 12 – March 18, 2013 estimate from the Guardian Corporation
- CL Ex. 13 – March 16, 2013 proposed Installment Retail Agreement Contract from Basement Unlimited Inc.
- CL Ex. 14 – Withdrawn
- CL Ex. 15 – June 1, 2011 estimate from D.W.M. and Associates
- CL Ex. 16 – December 1, 2008 Complaint from the Claimant to the MHIC
- CL Ex. 17 – August 27, 2008 letter from the Claimant to Russell Lam, Baltimore County Office of Community Conservation

I admitted the following exhibits on the Fund’s behalf:

- GF Ex. 1 – March 20, 2013 Notice of Hearing
- GF Ex. 2 – January 30, 2013 Hearing Order from the MHIC
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- GF Ex. 3 – July 30, 2013 Department Records Review re: the Respondent
- GF Ex. 4 – June 7, 2011 MHIC Claim Form filed by the Claimant (stamped on the reverse side as received by the MHIC on August 3, 2011)

I admitted the following exhibits on the Respondent's behalf:

- RESP Ex. 1 – September 15, 2005 Deficiency List from the Baltimore County Office of Community Conservation, Housing Opportunities Programs re: the Claimant's home (with handwritten notes different than those on Cl. Ex. 1)
 - RESP Ex. 2 – Improvements Bid –List estimate from the Respondent (with handwritten notes different from those on Cl. Ex. 2)
 - RESP Ex. 3 – Baltimore County Office of Community Conservation (BCOCC), Housing Opportunities Programs General Requirements and Specifications for Rehabilitation Contracts (Requirements Booklet)
 - RESP Ex. 4 – October 26, 2007 contract between the Claimant and the Respondent for \$26,127.00 (with different interlineations than those on CL Ex. 1A)
 - RESP Ex. 5 – February 15, 2008 Contractor Payment Request no. 1
 - RESP Ex. 6 – April 9, 2008 Contractor Payment Request no. 2
 - RESP Ex. 7 – Undated Final Payment Request/Certificate of Completion (signed by the Claimant June 6, 2008)
 - RESP Ex. 8 – Undated Waiver of Liens (signed by the Respondent June 11, 2008)²
 - RESP Ex. 9 – March 13, 2008 check from the Respondent to Nelson Precast for \$2,100.00
 - RESP Ex. 10 – September 10, 2008 Claim Form submitted by the Claimant to the MHIC (received January 30, 2009)
 - RESP Ex. 11 – The Respondent's depiction of the Claimant's home's main entrance and front porch (hand drawn by the Respondent during the second day of hearing, August 5, 2013)
 - RESP Ex. 12 – Undated letter from the Respondent to the DLLR (stamped on the reverse side of page 1 as received by the MHIC on May 22, 2009)
 - RESP Ex. 13 – August 19, 2011 letter from the Respondent to the MHIC, attaching June 1, 2011 estimate from D.W.M. and Associates (with the Respondent's handwritten notes)
 - RESP Ex. 14 – The Respondent's list of items purchased from Home Depot, together with ~~prices and receipts~~
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² The first page of RESP Ex. 8 indicates it was to be signed in 2007. That appears to be an error, as the work was completed in 2008 and a notary crossed out the year 2007 on the second page and substituted 2008 in notarizing the Respondent's signature.

- RESP Ex. 15A – The Respondent’s undated photograph of the Claimant’s home’s windows before replacement
- RESP Ex. 15B – The Respondent’s undated photograph of the Claimant’s home’s front first floor windows and porch railing after replacement
- RESP Ex. 15C – The Respondent’s undated photograph of the Claimant’s home’s dining room bay and double hung windows after replacement
- RESP Ex. 15D – The Respondent’s undated photograph of the Claimant’s home’s rear windows after replacement
- RESP Ex. 16A – The Respondent’s undated photograph of the Claimant’s home’s kitchen subfloor installed by the Respondent
- RESP Ex. 16B – The Respondent’s undated photograph of the Claimant’s home’s kitchen ceramic tile floor installed by the Respondent
- RESP Ex. 17A – The Respondent’s undated photograph of the Claimant’s home’s basement showing framing installed by the Respondent
- RESP Ex. 17B – The Respondent’s undated photograph of the Claimant’s home’s basement showing floor installed by the Respondent
- RESP Ex. 17C – The Respondent’s undated photograph of the Claimant’s home’s basement showing room installed by the Respondent
- RESP Ex. 18 – The Respondent’s list of estimated costs he incurred in doing work beyond that approved by the BCOCC
- RESP Ex. 19 – The Respondent’s undated photograph of the Claimant’s driveway

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund presented no witnesses.

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, holding MHIC license number 01-67150.

2. The Claimant is an Accounting Clerk with the Department of Public Safety and Correctional Services. She completed high school and took certain accounting courses at Baltimore City Community College.
3. The Claimant's home is in Baltimore County, Maryland. In or about 2005, the Claimant applied to the BCOCC for a rehabilitation loan. The BCOCC made loans for home rehabilitation to homeowners who resided in their homes. The loans were made on favorable terms, and did not have to be repaid, except in limited circumstances, including in the event the homeowner transferred title.³
4. In her application, the Claimant listed, among other things, all the changes she wanted to make to her home.⁴
5. BCOCC Rehabilitation Specialist, Randy Jones, visited the Claimant's home prior to loan approval and the Claimant discussed with him all the changes she wished to make to the home. On or about September 15, 2015, the BCOCC approved the Claimant's application. On that date, it issued a Deficiency List, listing all the improvements to be made pursuant to, and paid for by, the rehabilitation loan.⁵
6. The BCOCC gave the Claimant a list of contractors approved for use by the BCOCC. The Respondent was an approved contractor who had won and performed several prior contracts from the BCOCC.
7. The Claimant did not know the Respondent prior to receiving his name from the BCOCC. After receiving the Deficiency List, the Claimant contacted and met with the Respondent to gauge his interest in doing the rehabilitation project.

³ Unlike traditional loans, a BCOCC loan is not repaid monthly. It must be repaid upon transfer of title. Although the Claimant did not make it clear, I assume for purposes of this decision that the loan also must be repaid in the event the home is refinanced or the borrower dies.

⁴ The Claimant did not provide a copy of her application for the record.

⁵ See CL Ex. 1 and RESP Ex. 1. Each party presented his or her copy of the Deficiency List, each with handwritten interlineations. The BCOCC did not make or approve the handwritten changes to the Deficiency List.

8. Following their meeting, the Respondent submitted an Improvements Bid-List to the Claimant detailing the Respondent's estimate of the total cost (including materials and labor) to do the work approved by the BCOCC. (Cl. Ex. 2; RESP. Ex. 2.)⁶ With minor exceptions, the Respondent's list of items tracked the list of approved items on the BCOCC's Deficiency List.⁷ The Respondent's estimate did not specify that the windows and basement entry door would contain locks, as specified by the Deficiency List.⁸ The Respondent's estimate included the removal and replacement of ceramic tile on the outside wall of the main bathroom, which was not one of the approved items on the Deficiency List.⁹ The Respondent's estimate did not include the replacement of four closet doors and three entry doors as specified on the Deficiency List.¹⁰ The Respondent's estimate included a cost for debris removal, which was not listed on the Deficiency List.
9. The Respondent estimated the total cost of the itemized work to be \$28,475.81.
10. The Claimant wanted to use the Respondent to do the work on her home. The Claimant submitted the Respondent's estimate to the BCOCC. The BCOCC approved the estimate with one exception. The BCOCC withdrew its prior approval of the erection of a roof cover over the Claimant's front porch, and had the Claimant and the Respondent initial the change.¹¹ This reduced the Respondent's estimate by \$3,130.00, to \$25,345.00.

⁶ The Claimant made most of the handwritten notes on Cl. Ex. 2. With the exception of the \$3,130.00 deduction listed on the second page of the exhibit, the notes do not represent changes to the estimate submitted by the Respondent.

⁷ Unless otherwise indicated, the two lists together shall be referred to as the Improvements Lists.

⁸ The Claimant did not claim that the Respondent failed to provide the required locks.

⁹ The Claimant did not claim that the Respondent failed to remove and replace the tile.

¹⁰ The doors were included among the repair/replacement items listed as item f. under the heading "Basement" on the Deficiency List. (CL Ex. 1.) As discussed below, I believe the doors were intended for the Claimant's bedrooms and bedroom closets, not for the basement. The Respondent did provide closet and bedroom entry doors.

¹¹ See RESP Ex. 2, Respondents Bid-List, Exterior item d. The Claimant's version of the Respondent's Improvements Bid-List shows that the roof item has been crossed out, but does not reflect the Claimant's or Respondent's initials next to the cross out. The Claimant does not dispute that the BCOCC removed this item from its approved list.

11. The BCOCC approved the Respondent's estimate and the parties executed a contract (Contract) on October 26, 2007. The Claimant read the Contract before signing.
12. Pursuant to the Contract as originally written, the total price was \$25,345.00.
13. The Contract had the following additional provisions, among others. Pursuant to paragraph 1, the Contract stated that the Claimant (Owner) had reviewed and approved the Respondent's estimate, and the BCOCC had agreed to fund it. Pursuant to paragraph 4, the Contract incorporated the BCOCC's Requirements Booklet; the Deficiency List; the Contractor Proposal, including drawings, if any; and the Proposal dated August 26, 2007.¹² Pursuant to paragraph 8, the Claimant and Respondent agreed not to make any additions or deletions to the work referenced in the Respondent's Improvements Bid-List without a written Change Order signed by the Claimant and Respondent and approved for funding by the BCOCC. Pursuant to paragraph 15g. of the Contract, barring unforeseen circumstances, the work was to be completed within 45 days of the authorization to proceed. Pursuant to paragraph 15r., the Respondent represented, by executing the Contract, that he had not "offered or promised any inducement, including but not limited to ... services, goods, or extra work to be performed without cost, to cause the Owner to employ the [Respondent], accept the proposal or enter into the Contract." (Resp. Ex. 4, paragraph 15r.) Pursuant to paragraph 17, if the Respondent failed to furnish materials or perform the work as specified, or failed to meet the deadline for completion, then the

¹²The Contract refers to the "Proposal." It does not reference the term Improvements Bid-List. (See RESP Ex. 4, paragraph 1.) The parties believe and I find that the "Proposal" referred to the Improvements Bid-List, given that the Contract price and the estimated price on the Improvements Bid-List are the same. In my recitation of the various Contract terms, I will treat any reference to the Proposal as referring to the Respondent's Improvements Bid-List estimate. Neither party was able to explain the reference to the August 26, 2007 Proposal. They are unaware of such a document and the reference date pre-exists the date of the Deficiency List. I conclude this document either does not exist or does not reference work to be done beyond that described in the Improvements Lists.

Owner, in conjunction with the BCOCC, had the right to declare a default and terminate the Contract unless the default was cured within 10 days or a mutually satisfactory alternative was arranged. Paragraph 18 of the Contract required the parties to arbitrate any dispute. Pursuant to paragraph 19, no payments would be made to the Respondent until the owner and a representative of the BCOCC had inspected and were satisfied with the work for which payment was requested.

14. Pursuant to Section 1A, paragraph 7 of the 1 Requirements Booklet incorporated into the Contract, the Claimant was prohibited from including any additional work not included in the Deficiency List unless approved by a BCOCC Rehabilitation Specialist. Pursuant to paragraph 10, all changes were to be approved in writing by the BCOCC before work was to be performed. Pursuant to Section 1C, payments were to be processed in accordance with the amount of work completed at the time of the request. In all requests for payment, the Claimant and the BCOCC were to be satisfied that the value of the work exceeded the amount requested.
15. On October 30, 2007, the parties amended the Contract to include additional work for \$782.00. Rusty Lam, another BCOCC Rehabilitation Specialist, approved the addendum in writing. (*See* RESP. Ex. 7, p. 2.) This raised the total Contract price to \$26,127.00 and the Contract was amended in writing to reflect the new price. (RESP. Ex. 4, paragraph 1.)¹³

¹³ Following the addendum, someone typed in a new Contract price of \$26,487.00. (*See* RESP Ex. 4, at p. 2; CL Ex. 1A, paragraph 1.) However, on the Respondent's copy of the Contract, someone wrote that this amount was incorrect. (*See* RESP Ex. 4, at p. 2.) Adding the numbers per the terms of the Deficiency List, the Improvements Bid-List and the addendum, the correct price was \$26,187.00, which was typed in as the correct amount on page one of the Respondent's copy of the Contract. (*Id.*, at p. 1, paragraph 1.).

16. Beginning in or about February 2008, the Respondent proceeded with the work called for by the Contract. He ultimately submitted three requests for payment (draw requests) as the work proceeded. Each draw request was in writing. Each contained a description of the work for which payment was requested; the Respondent's written certification that he had satisfactorily completed the work; the Claimant's signed certification that to the best of her knowledge, the work was satisfactorily completed; and (before payment) BCOCC Rehabilitation Specialist Lam's certification that the work had been done in accordance with the terms of the Contract, and Mr. Lam's approval for payment.
17. The Respondent's final draw occurred on or about June 6, 2008.
18. Prior to the final draw payment, the Claimant never complained to the Respondent or the BCOCC expressing dissatisfaction with the Respondent's work.
19. The BCOCC never identified any inadequate, incomplete or unworkmanlike work by the Respondent.
20. At an unknown point following issuance of the Deficiency List, the Claimant asked the Respondent to perform certain work on the Claimant's home not included on the Deficiency List. This work also was not included on the Respondent's Improvements Bid-List. The Respondent indicated he would do additional work in exchange for additional payment by the Claimant. This understanding between the parties was of a general nature. The amount of payment would be determined on a job-by-job basis. Specific payment terms were not discussed and the parties did not put any of this in writing.
- ~~21. The Respondent did do some work at the Claimant's home that was not on the~~
Improvements Lists. This included erection of a shed; installation of a new countertop and floor cabinets in the kitchen; and a partial frame-out in the basement. The Claimant

paid the Respondent for the shed. However, when the Respondent requested payment for materials he acquired and for other extra work he had performed, the Claimant refused payment, claiming that the Respondent had agreed to do all the extra work for no additional compensation beyond that specified in the Contract. The Respondent then refused any further work and ended his work relationship with the Claimant.

22. At all relevant times the Claimant owned fewer than three dwellings. She was not an employee, officer or partner of the Respondent or an immediate relative of any of his partners, officers or employees.

23. The Claimant suffered an actual, compensable loss of \$543.30.

DISCUSSION

The Claimant asserts that the Respondent failed to adequately provide a number of the repair and replacement items listed on the Improvements Lists. In addition, the Claimant asserts that the Respondent agreed to provide, at no additional cost, a number of repairs, replacements and installations that were not on the Improvements Lists. The Claimant claims that the Respondent agreed to inflate his estimate to the BCOCC to do the work approved by the BCOCC to cover the cost of this extra work.

An owner bears the burden to prove his claim against the Fund by a preponderance of the evidence. Act, § 8-407(e); COMAR § 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2009). With certain modest exceptions found below, I find that the Claimant failed to sustain her burden of proof.

An owner must prove a number of elements to recover compensation from the Fund. The owner must prove "an actual loss that results from an act or omission by a licensed contractor."

Act, § 8-405(a). *See also* 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." Act, § 8-401.

In addition, an owner must prove that at all relevant times: the owner owned fewer than three dwelling places; (b) the work at issue concerned the owner's personal residence in Maryland; (c) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (i) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Act, §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Claimant met most of the above elements. The Respondent was a licensed home improvement contractor; the work concerned remodeling the Claimant's primary residence and she did not own more than three dwelling places; the parties were neither related nor associated in business; the Claimant did not file any other action to recover for the Respondent's acts or omissions; and the Claimant filed her claim within three years of the date of the Contract. Further, the Claimant has not engaged any contractor to remedy the Respondent's alleged acts and omissions.

There are four issues to resolve: (1) whether the Respondent's claim is barred by her failure to arbitrate the claim in accordance with the Contract's mandatory arbitration clause; (2) ~~whether the Respondent's repair or replacement of any of the items specified in the~~ Improvements Lists was unworkmanlike, inadequate or incomplete; (3) whether the Respondent agreed to but failed to do or properly complete additional work not on the Improvements Lists

at no additional cost to the Claimant; and (4) the amount of the Claimant's actual compensable loss, if any.

1. The Claimant's claim that the Respondent's work was unworkmanlike, inadequate and incomplete is not barred by the Claimant's failure to arbitrate her claims.

Paragraph 18 of the Contract contains a mandatory pre-arbitration and arbitration clause. The Claimant admitted that, although she ultimately brought her claims to the attention of the BCOCC, she did not pursue the contractually required pre-arbitration or arbitration. Her failure to do so directly contravenes the statutory requirement that "a claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the Fund." Act, § 8-405(c).

The clear purpose of this provision is to avoid unnecessary litigation before the MHIC. Thus, if a Claimant files a claim against the Fund and the Respondent invokes the arbitration clause thereafter, the Fund's resources expended in considering the merits of the claim up to the time of the demand will have been wasted. Here, however, the Respondent never invoked the arbitration clause. The Respondent let the Claimant's complaint sit with the MHIC for years without asserting a demand for arbitration and, in fact, did not assert the demand at any time during the hearing before me. The Fund also did not insist on arbitration after it was given a copy of the Contract as an exhibit at the hearing.

The requirement of arbitration can be waived. *See, e.g., MicroStrategy, Inc. v. Lauricia*, 268 F. 3d 244, 249 (4th Cir. 2001). One who unreasonably delays the demand for arbitration or substantially proceeds in a separate litigation forum, such that the other party would suffer prejudice if the arbitration clause were belatedly enforced, may be deemed to have waived the right to arbitrate. *Id.* Here, the fact that the Respondent would have to retry her claim entirely anew if arbitration were required amounts to substantial prejudice. Because of that, because the Respondent never invoked the arbitration clause, and because the Fund did not insist upon

arbitration after learning of the mandatory arbitration clause, I find that the arbitration requirement has been waived.

2. The Claimant's performance of the work required by the Improvements Lists was, with two exceptions, not unworkmanlike, inadequate or incomplete.

The Respondent claimed the following unworkmanlike, inadequate or incomplete performance by the Respondent with respect to work allegedly covered by the Improvements Lists:¹⁴ (1) the Respondent failed to conceal certain basement wires and cables behind the walls or ceiling; (2) the Respondent failed to install a GFCI (Ground Fault Circuit Interrupter) in the basement; (3) the Respondent failed to patch holes the Respondent cut in the basement ceiling to deal with leaks from an upstairs bathroom; (4) the Respondent failed to paint the basement ceiling after stabilizing the tub in an upstairs bathroom; (5) the Respondent failed to install a bay window in the living room; (6) the Respondent failed to correctly install a window in the Claimant's daughter's bedroom, leaving gaps; (7) the Respondent installed windows in the master bathroom that do not match (either each other or the bathroom tile); (8) the Respondent failed to install four "chop block" windows requested by the Claimant;¹⁵ (9) the wood frames around two of the windows installed by the Respondent split; (10) the Respondent failed to remove the imprint of the old window frame when installing a new window and frame in the basement; (11) the Respondent failed to properly re-hang and secure the Claimant's home's gutters; (12) the Respondent failed to place a fan belt on an attic fan he installed and failed to install an electrical switch correctly, causing a fire and requiring the fan to be removed; (13) the Respondent failed to properly scrape and paint the attic vent; (14) the Respondent failed to

¹⁴ The Claimant's testimony as to what was and was not covered by the Improvements Lists was difficult to pin down. She asserted different things at different times. I have done my best to sort out the claims by category. To the extent I have failed to ascribe the claims to the proper category, and assuming that makes a difference as to outcome, then I find that the Claimant failed to carry her burden of proof on such claims.

¹⁵ The Claimant did not explain the meaning of a "chop block" window. It is not a commonly understood term. I assume for purposes of the discussion the Claimant meant glass block windows. I shall refer to the list of alleged failures as items 1 through 17.

properly repair cracks in the Claimant's driveway; (15) the Respondent failed to properly repair the railing on the Claimant's home's front porch landing; (16) the Respondent improperly installed and/or failed to install closet doors and entry doors in the three bedrooms; and (17) the Respondent failed to put concrete over the front porch to support a roof.¹⁶

The Claimant failed to satisfy her burden with respect to all but two of these claims.

First, I find that the Claimant's testimony in general lacked credibility. Much of my concern arises from the Claimant's assertion that the Respondent agreed to do extra work at no additional cost, instead inflating the price of the work authorized by the BCOCC to cover the cost of the extra work. I will go into that aspect of the Claimant's testimony, and precisely why I find it not credible, later in this proposed decision. For purposes of the present discussion, however, it suffices that this aspect of the Claimant's testimony was essential to a major portion of her overall claim. Thus, in finding that testimony not credible, the lack of credibility negatively influenced my view of her testimony on all matters.

My lack of faith in the Claimant's testimony also is based on her specific assertions with respect to her claims that individual aspects of the Respondent's work pursuant to the Improvements Lists was unsatisfactory. First, the Claimant signed off on all the work provided by the Respondent and billed pursuant to the Contract, attesting that to the best of her knowledge the work was satisfactory. While some of the alleged defects may not have been apparent upon initial inspection, some of the alleged defects would have been obvious, such as, for example, the alleged failure to provide windows, including a bay window, in accordance with the Improvements Lists; the alleged failure to patch holes in the basement ceiling; the alleged failure

¹⁶ The Claimant never clearly explained what she meant by this last claim. It is important because it represents a substantial dollar claim. I will address the claim both as it relates to work to be performed pursuant to the Deficiency List and Improvements Bid-List and as to extra work to which the Respondent allegedly agreed.

to paint the ceiling; and the alleged failure to install doors or install them correctly so they closed properly. Despite these and other alleged obvious defects, the Claimant signed off on all the draw requests and did not complain to the BCOCC Rehabilitation Specialist, despite knowing that the BCOCC representative also had to approve the work before authorizing payment. The Claimant's credibility is further undermined by the fact that the BCOCC Rehabilitation Specialist was required to inspect all work for adequacy before signing off on draw requests and authorizing payment. Yet the Rehabilitation Specialist never indicated the existence of any unsatisfactory work.

In this regard, the Claimant's testimony was especially troubling. She asserted at least once during her testimony her belief that the Rehabilitation Specialist *never* inspected any of the Respondent's work. She gave no basis for that claim and admitted that the Rehabilitation Specialist could have inspected the work while the Respondent was at work. I find it beyond belief that the Rehabilitation Specialist would have so thoroughly shirked his employment-based responsibility.

Based on all the above factors, and as further noted below with respect to the Claimant's individual claims, I reject the Claimant's testimony regarding defects in the performance of the work called for by the Improvements Lists except in those two below-specified instances where the claim is supported by credible, independent evidence.

The Claimant's assertion that the Respondent failed to conceal wires and cables (item 1) fails due to the Claimant's lack of credibility and because she did not prove a breach. Pursuant to the Requirements Booklet, wires were to be concealed only where possible. (RESP. Ex. 3, section 12A, item 2b.) ~~The exposed wires and cables about which the Claimant complains are in~~

the basement and run against a concrete wall. (*See* CL. Ex. 8.) The Claimant failed to put on any evidence that the wires and cables could be concealed behind the concrete wall, in the ceiling or beneath the floor.

The Claimant asserted that the Respondent failed to install a GFCI switch in the basement (item 2), and offered an estimate of repair from another contractor, D.W.M. and Associates (DWM), to support her claim. The Improvements Lists required the installation of a GFCI switch in all bathrooms, and there is a bathroom in the basement. For this reason, I accept the Claimant's claim that the Respondent failed to install the basement bathroom GFCI switch. I accept DWM's estimate that installation of the switch in the basement will cost \$90.00.

I reject the Claimant's assertion that the Respondent failed to patch holes he placed in the ceiling following his repair of a leak (item 3), due to the Claimant's lack of credibility and for lack of other credible proof. The Respondent denied the claim. The Claimant offered a photograph in support of this claim, but the photograph does not show holes in the ceiling. Further, the Improvements Lists did not require any leak repair.

I also reject the Claimant's assertion that the Respondent failed to paint the basement ceiling (item 4) in violation of the Improvements Lists, again due to the Claimant's lack of credibility and for lack of other credible proof. The Respondent denied the claim. The Improvements Lists do not require any painting.

The Claimant alleged that the Respondent failed to install a bay window (item 5) required by the Improvements Lists. I reject this claim because, among other reasons, the Respondent did install a bay window. (*See* RESP Ex. 15c.)

~~I reject the Claimant's claim that the Respondent improperly installed a window in the~~
daughter's bedroom (item 6) and failed to install matching windows in the Claimant's bathroom (item 7), due to the Claimant's lack of credibility and for lack of other credible proof. The

Respondent denied the claim. The Claimant had no pictures showing that the daughter's window was improperly installed or that the Claimant's bathroom windows did not match each other or something else in the bathroom.

I also reject, due to the Claimant's lack of credibility and lack of other credible proof, the Claimant's assertion that the Respondent failed in violation of a private agreement between them to install four chop block windows. The Respondent denied such an agreement and the Requirements Booklet specified vinyl or aluminum dual paned windows. I am satisfied that if the Respondent, who had handled numerous prior BCOCC contracts, agreed to a change he would have submitted a change order or the Rehabilitation Specialist would have noted the variance. I also note the Claimant's testimony that she reviewed with BCOCC Rehabilitation Specialist Jones all the changes she wanted before she met the Respondent. Given that, it does not make sense that she would have told Mr. Jones of her desire for chop block windows, but failed to insist on their inclusion in the Improvements Lists.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's assertion that the wood frames around two of the windows installed by the Respondent split (item 9). The Respondent denied this claim. The Claimant, who brought photographs in support of some of her claims to the hearing, failed to introduce any photographs supporting this claim. Given her reliance on photographs to support her claims, her failure to produce photographs of the split windows undermines her claim.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's assertion that the Respondent wrongly failed to remove the imprint of the old window frame when installing a new window and frame in the basement (item 10). The

Claimant did introduce a photograph showing the imprint (Cl. Ex. 7.) However, the Contract is for repair; it does not include painting. To eliminate the imprint, the basement wall would need to be repainted.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the claim that the Respondent failed to properly re-hang and secure the Claimant's home's gutters (item 11). The Respondent denied this claim. The Claimant produced a single photograph showing one spot along the gutters. There appears to be something amiss with respect to a roof vent, but the gutter and downspout appear properly installed. (Cl. Ex. 6.) The Claimant did not explain what was wrong with the gutter and downspout. In addition, the Claimant offered only this single photograph of one spot, while the Respondent was required to secure the gutters and downspouts around the house. I do not find any defect here.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's claim that the Respondent failed to place a fan belt on an attic fan he installed and failed to install an electrical switch correctly, causing a fire and requiring the fan to be removed (item 12). The Respondent denied this claim. The Claimant presented no independent evidence of a fire and no expert testimony that the Respondent improperly installed an electrical switch in the attic or left off a fan belt from the attic fan. Had this been the case, there would have been some cost associated with repair to the attic, yet the Claimant did not introduce proof of any such loss.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's claim that the Respondent failed to properly scrape and paint the attic vent (item 13). ~~The need to paint the attic vent is one of the items listed on the D.W.M. and Associates~~ estimate from 2011. The Claimant's photograph of the attic fan vent did not show the need for repainting. (CL Ex. 3A.) Moreover, the D.W.M. and Associates estimate was written three years

after the Respondent finished his work. In that period of time it is plausible that the attic vent might require repainting, even if properly painted three years earlier. For all these reasons and also due to the absence of testimony from a D.W.M. representative or other expert that the Respondent's work was inadequate, I reject the Claimant's claim.

I accept the Claimant's assertion that the Respondent failed to properly repair cracks in the Claimant's driveway (item 14). The total cost to reset the front concrete walkway and point up/patch the driveway was \$906.60. The Claimant produced a photograph showing the cracks, which she claimed showed the condition of the driveway after the Respondent finished his work (Cl. Ex. 5.) The Respondent admitted the existence of driveway cracks, but testified that he repaired the driveway several times and that the cracks re-appeared each time because the Claimant continued to drive and park on the driveway before the driveway repair cured. The Respondent asserted that he repeatedly explained to the Claimant the need to remain off the driveway pending the cure period. However, the Respondent also testified that he never taped off or otherwise blocked the entrance to the driveway to ensure that no one drove on it. This sort of preventive tactic is common when laying or re-coating driveways and the Respondent's failure to do so was a departure from a common sense standard. Whether or not the Claimant drove on the driveway, the Respondent's failure to block access allowed others to drive on it without knowing of the need not to park there, and the Respondent could not say whether others did drive on the driveway.

I reject, due to the Claimant's lack of credibility and for lack of other credible proof, the claim that the Respondent failed to install and/or improperly installed closet doors and entry doors in the three bedrooms (item 15). ~~Here again, the Claimant failed to produce photographs~~ showing the improper workmanship or omissions. She also failed to explain why the BCOCC Rehabilitation Specialist would overlook such obvious defects or omissions.

I reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's claim that the Respondent failed to properly repair the railing on the Claimant's home's front porch landing (item 15). The Respondent denied this claim. The Claimant's photographs contradict the claim.

I also reject, due to the Claimant's lack of credibility and for lack of other credible proof, the Claimant's assertion that the Respondent failed to put concrete over the front porch to support a porch roof (item 16). The Respondent denied this claim. As previously stated, it is not clear whether the Claimant contended this was work called for by the Improvements Lists or was extra work the Respondent allegedly agreed to provide at no additional charge. Assuming the Claimant contended that the work was part of that required pursuant to the Improvements Lists, I reject the claim for lack of proof. The Improvements Lists initially included as a line item the installation of a front porch roof, but that item was deleted, and both the Claimant and the Respondent initialed the deletion. The Improvements Lists had a separate section devoted to approved concrete work, and concrete above the front porch was not included.

3. *The Respondent did not agree to do, without additional charge, work beyond that specified in the Improvements Lists.*

I also reject as unbelievable the Claimant's assertion that the Respondent agreed to do work beyond that specified on the Improvements Lists without additional charge. According to the Claimant, the Respondent would be compensated for this extra work by inflating the cost of the work specified on the Improvements Lists.

This is simply not credible, for a variety of reasons. First, the total Contract price was \$26,127.00. According to the D.W.M. and Associates and Basement Unlimited estimates, the extra work cost a minimum of \$9,653.00. If the front porch roof and basement build out were to

be included, the extra work would exceed \$20,000.00¹⁷ It is not credible that the Respondent would agree to do for free extra work representing anywhere from 37% to 76% or more of the total paid contract price.

Interestingly, the Claimant testified that the Respondent told her the items he marked up on the Improvements Lists and the amount of the markups to cover the extra work costs. Yet, the Claimant did not identify each of the precise items or the amount of the markups. In fact, the Claimant only specified two items that she claimed were overpriced: repair of the main bathroom sub-floor and removal and replacement of the outside tub wall tile. The total estimate for these two items was \$1,319.60, far less than the amount necessary to cover the cost of all the extra items involved.

There are numerous other problems with the Claimant's assertion. It is not believable that the BCOCC Rehabilitation Specialists would authorize significantly inflated cost estimates submitted by a contractor. It is equally unbelievable that the Respondent would have secretly violated the express terms of the Contract by agreeing to do extra work without additional compensation. Such an agreement would expressly violate the provisions of the Requirements Booklet. I cannot imagine a credible reason the Respondent would risk his ongoing relationship with the BCOCC to do this extra work at a likely overall loss on the job. Were he to take such a risk, I believe the Respondent would have done so only if assured of a heavy profit to compensate for the risk involved.

¹⁷ Again, the Claimant's testimony was not clear as to the specific extra work the Respondent allegedly agreed to do. I am including the following items from the D.W.M. estimate and the Basement Unlimited estimates (CL Exs. 13 and 15): install a new countertop (\$2,000.00); Install a new kitchen backsplash (\$700.00); create a corner counter in kitchen (\$600.00); install new bathroom vanity (\$500.00); re-do basement sump pump and waterproof walls (\$5,853.00). This does not include re-installation of the kitchen cabinets, which is not on the Improvements Lists (\$4,100.00); installation of the front porch roof (\$6,290.00; and finishing the frame out of the basement (for which the Claimant did not provide a price). Without the latter two items, the total cost of the extra work was a minimum of \$9,653.00. With the other three items, the total cost was in excess of \$20,000.00.

A further problem with the Claimant's claim is her statement that the motivation for this outside agreement was the Respondent's claim that the BCOCC would not pay for the items she wanted to include. Yet the Claimant met with the BCOCC before she met the Respondent, and she testified that she told BCOCC Rehabilitation Specialist Jones everything she wanted to do to her home. These two statements are inconsistent; if she told Mr. Jones everything she wanted to include, then she did not need the Respondent to tell her what the BCOCC would pay for; she already knew that from the BCOCC's Deficiency List, issued before the Claimant met the Respondent.

There are still other problems with the Claimant's assertion. She testified that the Respondent produced drawings of all the work he agreed to do, yet the Claimant failed to produce the drawings. She claimed she met with other contractors in getting estimates for the work on the Deficiency List, and these contractors gave lower bids than that provided by the Respondent. Yet the Claimant did not produce these lower bids.

There is no doubt that the Claimant and Respondent did discuss extra work to be done. The Respondent so testified and indicated that he began the extra work. This included installation of a new kitchen countertop and partial frame-out of the basement. The Respondent testified that he and the Claimant had a loose understanding that the Claimant would pay for the extra work, but that they never established a firm list of extras or the cost to do them. The Respondent introduced into evidence receipts for material he purchased for the extra work, which he said he presented to the Claimant for reimbursement. When she refused, he stopped the work.

~~For all the above reasons, I reject the Claimant's assertion that the Respondent agreed to~~
do extra work at no additional cost. I accept the Respondent's version of events and find that he was justified in stopping work when the Claimant refused to pay him for work already done. I

find that the Respondent was not responsible for unworkmanlike, inadequate or incomplete work with respect to any of the alleged extra work he performed or agreed to perform.

4. The Claimant proved an actual loss.

Based on the above discussion, I find that the Respondent failed to meet his contractual obligation to the Claimant as to two items: he failed to install a GFCI receptacle in the basement and failed to properly patch the Claimant's driveway.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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).¹⁸ MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

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)(c).

Pursuant to the BCOCC loan, the Respondent was paid for a GFCI receptacle he did not install. In addition, he was paid for patching the driveway, which he failed to properly complete. Applying the above formula, it is clear the Claimant is due \$90.00 for the cost to install the GFI receptacle, as estimated by D.W.M. and Associates. The Respondent did not claim that was an unreasonable estimate.

¹⁸ The Claimant asserted that she incurred extra storage fees for storing household items displaced during the Respondent's work, which took months beyond the 45 days for completion specified in the contract. However, the Claimant did not identify the cost of additional storage. In addition, even if she had, these extra storage costs constitute consequential damages and, thus, are not recoverable.

D.W.M. and Associates did not provide an estimate for the cost to properly repair the driveway. In his Improvements Bid-List, the Respondent estimated the cost to repair the driveway and the front concrete walkway was \$906.60. He did not break down the estimate between the two items included. However, a fair and reasonable estimate to correct the Respondent's inadequate work on the driveway is at least 50% of the overall estimate, or \$453.30.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual, compensable loss of \$543.30 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010) and 8-405(a) (Supp. 2013); COMAR 09.08.03.03B.

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$543.30; 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 as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

November 4, 2013
Date Decision Issued

Henry R. Abrams
Administrative Law Judge

IN THE MATTER OF THE CLAIM	* BEFORE HENRY R. ABRAMS,
OF DEVRA Y. MOULTON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-08997
FOR THE ALLEGED ACTS OR	* MHIC NO.: 09 (90) 1212
OMISSIONS OF GEORGE A. SYKES,	*
T/A G A S CONSTRUCTION	*
SERVICES,	*
RESPONDENT	*

* * * * *

FILE EXHIBIT LIST

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- CL Ex. 1 – September 15, 2005 Deficiency List from the Baltimore County Office of Community Conservation, Housing Opportunities Programs re: the Claimant's home (with handwritten notes)
- CL Ex. 1A – October 26, 2007 contract between the Claimant and the Respondent for \$26,487.00 (with interlineations)
- CL Ex. 2 – Undated Respondent's Improvements Bid –List estimate (with handwritten notes)
- CL Ex. 3 – The Claimant's undated photograph of the Claimant's home's living room window
- CL Ex. 3A – The Claimant's undated photograph of the Claimant's home's shuttered attic fan
- CL Ex. 4 – The Claimant's undated photograph of the location of outside storage units on the Claimant's driveway

- CL Ex. 5 – The Claimant's undated photograph of the Claimant's driveway showing filled-in cracks

CL Ex. 6 – The Claimant’s undated photograph of a portion of the Claimant’s home’s gutter and downspout

CL Ex. 7 – The Claimant’s undated photograph of the Claimant’s home’s basement window

CL Ex. 8 – The Claimant’s undated photograph of the Claimant’s home’s basement showing exposed electrical cables

CL Ex. 9 – The Claimant’s undated photograph of the Claimant’s home’s basement showing exposed electrical cords

CL Ex. 10 – The Claimant’s undated photograph of the Claimant’s home’s patched basement ceiling

CL Ex. 11 – The Claimant’s undated photograph of the Claimant’s home’s basement ceiling showing enclosed ductwork

CL Ex. 11A – The Claimant’s undated photograph of the interior of the Claimant’s home’s basement closet showing sump pump

CL Ex. 12 – March 18, 2013 estimate from the Guardian Corporation

CL Ex. 13 – March 16, 2013 proposed Installment Retail Agreement Contract from Basement Unlimited Inc.

CL Ex. 14 – Withdrawn

CL Ex. 15 – June 1, 2011 estimate from D.W.M. and Associates

CL Ex. 16 – December 1, 2008 Complaint from the Claimant to the MHIC

CL Ex. 17 – August 27, 2008 letter from the Claimant to Russell Lam, Baltimore County Office of Community Conservation

I admitted the following exhibits on the Fund’s behalf:

GF Ex. 1 – March 20, 2013 Notice of Hearing

GF Ex. 2 – January 30, 2013 Hearing Order from the MHIC

GF Ex. 3 – July 30, 2013 Department Records Review re: the Respondent

~~GF Ex. 4 – June 7, 2011 MHIC Claim Form filed by the Claimant (stamped on the reverse side as received by the MHIC on August 3, 2011)~~

I admitted the following exhibits on the Respondent’s behalf:

RESP Ex. 1 – September 15, 2005 Deficiency List from the Baltimore County Office of

Community Conservation, Housing Opportunities Programs re: the Claimant's home (with handwritten notes different than those on Cl. Ex. 1)

RESP Ex. 2 – Improvements Bid –List estimate from the Respondent (with handwritten notes different from those on Cl. Ex. 2)

RESP Ex. 3 – Baltimore County Office of Community Conservation (BCOCC), Housing Opportunities Programs General Requirements and Specifications for Rehabilitation Contracts (Requirements Booklet)

RESP Ex. 4 – October 26, 2007 contract between the Claimant and the Respondent for \$26,127.00 (with different interlineations than those on CL Ex. 1A)

RESP Ex. 5 – February 15, 2008 Contractor Payment Request no. 1

RESP Ex. 6 – April 9, 2008 Contractor Payment Request no. 2

RESP Ex. 7 – Undated Final Payment Request/Certificate of Completion (signed by the Claimant June 6, 2008)

RESP Ex. 8 – Undated Waiver of Liens (signed by the Respondent June 11, 2008)

RESP Ex. 9 – March 13, 2008 check from the Respondent to Nelson Precast for \$2,100.00

RESP Ex. 10 – September 10, 2008 Claim Form submitted by the Claimant to the MHIC (received January 30, 2009)

RESP Ex. 11 – The Respondent's depiction of the Claimant's home's main entrance and front porch (hand drawn by the Respondent during the second day of hearing, August 5, 2013)

RESP Ex. 12 – Undated letter from the Respondent to the DLLR (stamped on the reverse side of page 1 as received by the MHIC on May 22, 2009)

RESP Ex. 13 – August 19, 2011 letter from the Respondent to the MHIC, attaching June 1, 2011 estimate from D.W.M. and Associates (with the Respondent's handwritten notes)

RESP Ex. 14 – The Respondent's list of items purchased from Home Depot, together with prices and receipts

RESP Ex. 15A – The Respondent's undated photograph of the Claimant's home's windows before replacement

RESP Ex. 15B – The Respondent's undated photograph of the Claimant's home's front first floor windows and porch railing after replacement

- RESP Ex. 15C – The Respondent’s undated photograph of the Claimant’s home’s dining room bay and double hung windows after replacement
- RESP Ex. 15D – The Respondent’s undated photograph of the Claimant’s home’s rear windows after replacement
- RESP Ex. 16A – The Respondent’s undated photograph of the Claimant’s home’s kitchen subfloor installed by the Respondent
- RESP Ex. 16B – The Respondent’s undated photograph of the Claimant’s home’s kitchen ceramic tile floor installed by the Respondent
- RESP Ex. 17A – The Respondent’s undated photograph of the Claimant’s home’s basement showing framing installed by the Respondent
- RESP Ex. 17B – The Respondent’s undated photograph of the Claimant’s home’s basement showing floor installed by the Respondent
- RESP Ex. 17C – The Respondent’s undated photograph of the Claimant’s home’s basement showing room installed by the Respondent
- RESP Ex. 18 – The Respondent’s list of estimated costs he incurred in doing work beyond that approved by the BCOCC
- RESP Ex. 19 – The Respondent’s undated photograph of the Claimant’s driveway