

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF BRIAN C. MICHELSON,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF CHRISTOPHER E.	*
HOUCK, JR., T/A LABHERD	* OAH No.: DLR-HIC-02-14-22355
BUILDERS & INVESTMENTS,	* MHIC No.: 12 (05) 1035
RESPONDENT	*

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On July 24, 2012, Brian C. Michelson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$46,011.20<sup>1</sup> in alleged actual losses suffered as a result of a home improvement contract with Christopher E. Houck, Jr., trading as Labherd Builders & Investments (Respondent).

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<sup>1</sup> The Claimant later filed an amended claim for \$18,150.20. Fund Ex. 6.

I held a hearing on July 29, 2014 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 and Supp. 2014). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant appeared without representation. The Respondent did not appear for the hearing despite receiving a Notice of Hearing from the OAH.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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. 2014); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

### **ISSUES**

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

- Clt. Ex. 1. Contract, April 12, 2011.
- Clt. Ex. 2. Copy of a check from the Claimant to the Respondent for \$10,318.00, January 22, 2011; copy of a check from the Claimant to the Respondent for \$9,954.20, April 18, 2011.
- Clt. Ex. 3. Lists of work completed and not completed by the Respondent in each room; approximations of the percentage of work completed in each room; and approximations of the value of the work done in each room.
- Clt. Ex. 4. Six photographs of the condition of several areas where the Respondent worked, after the Respondent left the job.

- Cl. Ex. 5. E-mails between the Claimant and the Respondent, December 29, 2010 to March 13, 2014.
- Cl. Ex. 6. Letter from the Claimant to the Respondent, May 14, 2012, with receipt for certified mail, May 22, 2012; letter from the MHIC to the Respondent, June 3, 2013; letter from the Office of the Attorney General to the Claimant, August 28, 2013; letter from the Office of the Attorney General to the Claimant, October 18, 2013; Dismissal of Arbitration Proceeding, April 10, 2014; letter from the MHIC to the Respondent, July 15, 2014.
- Cl. Ex. 7. Invoices from Blevins Home Improvement, February 4 to March 14, 2012; e-mails between the Claimant and David Blevins about appliances, February 8 to 20, 2012.

I admitted the following exhibits into evidence on the Fund's behalf:

- Fund Ex. 1. Notice of Hearing, July 2, 2014; receipt for certified mail from the Respondent, July 3, 2014; receipt for certified mail from the Claimant, July 12, 2014.
- Fund Ex. 2. Hearing Order, June 20, 2014.
- Fund Ex. 3. The Respondent's licensing history with the MHIC.
- Fund Ex. 4. Home Improvement Claim Form, July 24, 2012; e-mail from the Claimant to the MHIC, August 2, 2012.
- Fund Ex. 5. Letter from the MHIC to the Respondent, July 31, 2012.
- Fund Ex. 6. Amended Home Improvement Claim Form, August 2, 2012.
- Fund Ex. 7. Letter from the MHIC to the Respondent, July 15, 2014.
- Fund Ex. 8. Another letter from the MHIC to the Respondent, July 15, 2014; letter from the Office of the Attorney General to the Claimant, August 28, 2013; letter from the MHIC to the Respondent, June 3, 2013; letter from the Claimant to the Respondent, May 14, 2012, with receipt for certified mail, May 22, 2012.

#### Testimony

The Claimant testified and presented the testimony of David E. Blevins, who was accepted as an expert in home improvement and home improvement estimates.

The Fund presented no testimony.

## PROPOSED 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 under MHIC license number 01-82646.

2. On April 12, 2011, the Claimant and the Respondent entered into a contract whereby the Respondent agreed to renovate, furnish, and decorate every room of the Claimant's condominium. The major work under the contract was to remove and replace all existing floors and install new laminate, carpet, or tile floors; patch and paint all drywall; and furnish and install new kitchen cabinets, countertops, and appliances. The contract also called for new bathroom fixtures, countertops, and vanities in two bathrooms, as well as trim and hardware throughout the condominium. The Respondent also agreed to furnish certain pieces of furniture, rugs, window treatments, lamps and wall décor.

3. The Respondent actually started work on the project before the contract was signed. The contract stated that work would be completed three months after the contract was signed.

4. The contract price was \$33,787.00.

5. The Claimant paid the Respondent \$20,272.20 under the contract.

6. Around June of 2011, the Claimant and Respondent agreed to certain changes in the contract that were not put in writing. The changes included upgrades to the kitchen cabinets, repair of some leaks, work in the fireplace area of the condominium, and possibly some other items.

7. The Claimant paid the Respondent \$5,539.00 as full payment for the changes to the contract.

8. Thus, the amended contract price was \$39,326.00, of which the Claimant paid \$25,811.20.

9. The Respondent worked steadily on the project for several months, including two or three months before the contract was signed. He installed new laminate (wood) floors in the living room, dining room, hallway, and kitchen, although the contract called for ceramic tile flooring in the kitchen.

10. All the laminate flooring was installed incorrectly.

11. In the living room, the Respondent did drywall repairs and painting and added trim and hardware as called for in the contract. He failed to provide window treatments, an area rug, an end table, table lamps, and wall décor as called for in the contract. He also did not hang the television.

12. In the dining room, the Respondent did drywall repairs and painting and added trim and hardware as called for in the contract. He failed to provide a new chandelier, an area rug, wall décor, and bar stools.

13. In the hallway, the Respondent did drywall repairs and painting and added trim and hardware as called for in the contract. He failed to provide hinges, handles, and wall décor.

14. In the kitchen, the Respondent painted some small areas, removed some cabinets, and took the microwave off the wall. He did not purchase or install new cabinets, countertops, or appliances as called for in the contract, nor did he install a ceramic tile backsplash, crown molding, kitchen faucet, trim, handles, a light, and wall décor.

15. In the hall bathroom, the Respondent installed a new bathtub with faucet, tile floor, and tile walls. He also installed a new toilet and painted most, but not all, of the room.

However, the Respondent failed to seal the tile grout and did not provide a vanity, countertop, sink, faucet, medicine cabinet, hinges, handles, lighting, wall décor, accessories, or trim.

16. In the master bathroom, the Respondent did no work.

17. In the hall bedroom, the Respondent did drywall repairs and painting and added trim and hardware as called for in the contract. He failed to provide new carpet, wall décor, window treatments, and hinges and handles.

18. In the master bedroom, the Respondent did drywall repairs and painting and added trim and hardware as called for in the contract. He failed to provide new carpet, furniture, wall décor, bedding, window treatment, and hinges and handles.

19. Around June 2011, the Respondent was working sporadically and was obviously not going to complete the job within the three months called for in the contract, which would end on July 12, 2011.

20. At this time, the Respondent told the Claimant that he needed additional money to keep working on the project.

21. The Claimant had paid the Respondent the first two draws under the contract, amounting to \$20,272.20, which had been due once the laminate flooring was installed.

22. The Respondent demanded the third draw of \$10,136.10, but that draw was not due until the kitchen was painted and cabinets installed, and the spare bedroom was painted and carpet installed. None of these things had been done.

23. The Claimant paid the Respondent \$5,539.00 for contract change orders, but refused to pay the third draw or advance any more money until the third draw items were completed.

24. The Respondent did a little more sporadic work on the project, but stopped work completely in September 2011.

25. The Respondent told the Claimant that he was not abandoning the job, but never returned to do any more work.

26. The Claimant tried to honor the arbitration clause in the contract, but the Respondent did not cooperate with the Claimant or the Office of the Attorney General in the arbitration process. The Respondent failed to appear for an arbitration proceeding on April 9, 2014.

27. The Claimant hired Blevins Home Improvement (Blevins), an MHIC-licensed contractor, to repair the Respondent's faulty work and complete the contract. David E. Blevins performed the work under this contract.

28. Blevins did not contract to provide any furniture, rugs, bedding, lamps, window treatments, or wall décor as called for in the contract with the Respondent.

29. Blevins had to remove the laminate floors installed by the Respondent because the concrete under the flooring had not been leveled, and the Respondent had not installed a vapor barrier. This left air pockets and moisture between the concrete and the laminate, making the laminate useless and subject to damage. The removed flooring could not be re-used and had to be replaced.

30. The cost to replace the flooring was \$5,500.00 to \$6,000.00.

31. In addition to replacing the flooring, Blevins finished the kitchen as called for in the Respondent's contract, at a cost of \$14,420.00.

32. The Claimant paid Blevins over \$30,000.00 total to replace the flooring and complete the contract. All the work and materials that Blevins furnished were the same as stated in the Respondent's contract with the Claimant.

33. The Respondent received notice of this hearing and failed to appear.

### DISCUSSION

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) (Supp. 2014). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). 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.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent then performed unworkmanlike, inadequate and incomplete home improvements.

The Claimant paid the Respondent \$10,318.00 on January 22, 2011 – a date before the contract was signed but when the Respondent was beginning work. The contract states that this draw would “be used to order the special order items (cabinets, appliances, etc. . .). Also to get the moldings, drywall repair products, paint, ceramic tile, and laminate flooring.” (Clt. Ex. 1.) The evidence shows that the Respondent did purchase flooring, molding, paint, and ceramic tile, but never bought the cabinets or appliances, which are the “big-ticket” items in this project. Although not mentioned in the draw schedule, the Respondent also never purchased countertops, bathroom vanities, or many other items for which he was responsible under the contract.



Quite obviously, the Respondent simply underbid this job and ran out of money. By June 2011, he had installed the flooring, both laminate and ceramic, but no carpet. He put down the laminate flooring incorrectly, without leveling the concrete or installing a vapor barrier, showing either incompetence or laziness (or both). When the Claimant refused to advance any more money after June 2011, the Respondent stopped working, leaving the job about one-third complete.

Mr. Blevins testified that a reasonable price for just the home improvement aspects of the contract would be \$40,000.00. This would exclude the furniture, wall décor, window treatments, bedding, lamps, and rugs that the Respondent agreed to provide. He also testified that he could not remember the exact amount that the Claimant paid him to finish the contract, but that it was between \$30,000.00 and \$35,000.00. The Claimant testified that he paid Blevins over \$30,000.00. This testimony exposes the two problems with the Claimant's claim: first, that providing furniture, wall décor, rugs, lamps, bedding, and window treatments is not home improvement; and second, that the Claimant could not give an exact figure of how much he paid to complete the contract.

Section 8-101(g) of the Business Regulation Article defines "home improvement" as follows:

(g)(1) "Home improvement" means:

- (i) the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or
- (ii) an improvement to land adjacent to the building.

(2) "Home improvement" includes:

- (i) construction, improvement, or replacement, on land adjacent to the building, of a driveway, fall-out shelter, fence, garage, landscaping, deck, pier, porch, or

swimming pool;

(ii) a shore erosion control project, as defined under § 8-1001 of the Natural Resources Article, for a residential property;

(iii) connection, installation, or replacement, in the building or structure, of a dishwasher, disposal, or refrigerator with an icemaker to existing exposed household plumbing lines;

(iv) installation, in the building or structure, of an awning, fire alarm, or storm window; and

(v) work done on individual condominium units.

(3) “Home improvement” does not include:

(i) construction of a new home;

(ii) work done to comply with a guarantee of completion for a new building project;

(iii) connection, installation, or replacement of an appliance to existing exposed plumbing lines that requires alteration of the plumbing lines;

(iv) sale of materials, if the seller does not arrange to perform or does not perform directly or indirectly any work in connection with the installation or application of the materials;

(v) work done on apartment buildings that contain four or more single-family units; or

(vi) work done on the commonly owned areas of condominiums.

Md. Code Ann., Bus. Reg. § 8-101 (Supp. 2014).

Delivery of furniture, wall décor, bedding, rugs, window treatments, and lamps is not an “addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building,” as “home improvement” is defined above. Thus, any amounts spent on these items must be excluded from the contract price. Fortunately, the Claimant provided approximate prices for all of the things the Respondent failed to deliver, including those that are not home improvements. Claimant Exhibit 3 lists these items, along with their approximate costs. For all eight rooms, the total is \$3,668.00 for missing furniture, wall décor, bedding, rugs, window treatments, and lamps. This sum must be subtracted from the contract price, making the latter figure \$35,658.00, which can be used to calculate the Claimant’s award from the Fund.

There is no doubt that the Claimant is eligible for an award, since the Respondent collected payments for work he did not do, performed incompetently, and ultimately abandoned the contract.

The MHIC's regulations provide three formulas for measurement of a claimant's actual loss in COMAR 09.08.03.03B(3). Because the Claimant hired another contractor, Blevins, to complete the contract, the following formula offers an appropriate measurement to determine the amount of the actual loss 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.

COMAR 09.08.03.03B(3)(c).

Attempting to do the calculations using this formula, though, leads to the second evidentiary problem – that neither the Claimant nor Mr. Blevins had an accurate record or memory of how much the Claimant paid Blevins. Both witnesses agreed that the cost of the floor was \$5,500.00 to \$6,000.00, and that the total amount paid was between \$30,000.00 and \$35,000.00. The floor, of course, was included in the total amount, so that figure is the only one that comes into play in calculating the award.

To be fair to all parties, I shall use \$30,000.00 as the amount the Claimant paid Blevins, absent proof of some higher dollar figure. According to the Claimant's testimony, \$30,000.00 was approximately correct, and Mr. Blevins testified to it as the low range of the payment he received. Therefore, the calculation under COMAR 09.08.03.03B(3)(c) is as follows:

\$25,811.20	paid to the Respondent; plus
<u>30,000.00</u>	paid to Blevins; equals
\$55,811.20	minus
<u>-35,658.00</u>	the contract price; equals
\$20,153.20	the Claimant's actual loss.

Under the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2014). In this case, the Claimant paid the Respondent more than \$20,000.00, but the actual loss computed above exceeds \$20,000.00 by \$153.20. Therefore, the Claimant is entitled to reimbursement from the Fund of the maximum amount, \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) (Supp. 2014).

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2014).

**RECOMMENDED ORDER**

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

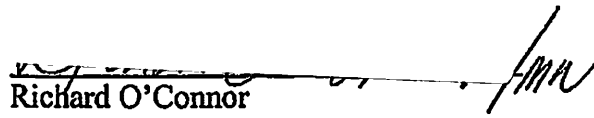
**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

**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(a) (2010); and

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

**Signature on File**

October 24, 2014  
Date Decision issued

  
~~Richard O'Connor~~  
Administrative Law Judge

# 152148

**PROPOSED ORDER**

***WHEREFORE, this 25th day of November 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.***

***Andrew Snyder***

***Andrew Snyder  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**

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