

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF PHILIP F. CRIST AND	* AN ADMINISTRATIVE LAW JUDGE
ANNA CRIST,	* OF THE MARYLAND OFFICE
CLAIMANTS	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH No.: DLR-HIC-02-13-43688
IMPROVEMENT GUARANTY FUND	* MHIC No.: 11 (90) 777
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	*
HOWARD WEBSTER, T/A	*
MARYLAND RESTORATION	*
SERVICES, T/A	*
WEBSTER ENTERPRISES, INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 9, 2013, Philip F. Crist filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$13,550.00 in

alleged actual losses suffered as a result of a home improvement contract with Howard Webster t/a Maryland Restoration Services t/a Webster Enterprises, Inc. (Respondent).¹

On September 9, 2014, I held a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland.² Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 and Supp. 2014). Jonathan Siegel, Esquire, and Jacob Wolf, Esquire, represented the Claimants. The Respondent was unrepresented. Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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

Did the Claimants sustain an actual 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 Claimants' behalf:

CL Ex. 1	Undated floor plan
CL Ex. 2A-2E	Photographs

¹ The Complaint was subsequently amended, without objection by the Respondent, to include as a claimant, Anna Crist, who is Mr. Crist's wife and co-owner of the home. As Ms. Crist testified at the hearing on the merits, I will refer to her in this Decision as the Claimant. I will refer to Mr. Crist by name and to Mr. and Ms. Crist, collectively, as the Claimants.

² Hearings scheduled for February 27, 2014 and August 18, 2014 were postponed at the Claimants' request for documented medical reasons.

- CL Ex. 3 June 18, 2010 contract between the Claimants and the Respondent (Contract)³
- CL Ex. 4 June 18, 2010 cancelled check from the Claimant to the Respondent in the amount of \$1,923.00; July 26, 2010 cancelled check from the Claimant to the Respondent in the amount of \$4,206.68
- CL Ex. 5 December 16, 2010 Complaint Form
- CL Ex. 6 March 30, 2011 letter from the MHIC to Mr. Crist
- CL Ex. 7 August 25, 2011 letter from the MHIC to Mr. Crist
- CL Ex. 8 June 26, 2013 Home Improvement Claim Form, with attachment
- CL Ex. 9 June 8, 2013 estimate from Sears
- CL Ex. 10 September 4, 2014 estimate from Next Day Floors
- CL Ex. 11 September 2, 2014 estimate from Priceless
- CL Ex. 12 March 27, 2013 letter from Armstrong World Industries, Inc. (Armstrong) to JJ Haines & Company, Inc. (JJ Haines)
- CL Ex. 13 Undated manufacturer's specifications
- CL Ex. 14 September 8, 2014 e-mail from Carlos Santos, Customer Service Representative, Customer Relations and Technical Services, Armstrong, to Jonathan Siegel, Esquire

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

- Resp. Ex. 1 Undated letter from David Day, JJ Haines, to the Respondent
- Resp. Ex. 2 May 10, 2013 e-mail from David Day to the Respondent

I admitted the following exhibits on the Fund's behalf:⁴

- Fund Ex. 1 February 27, 2013 Notice of Hearing; November 4, 2013 Hearing Order
- Fund Ex. 2 May 9, 2014 Notice of Hearing
- Fund Ex. 3 July 3, 2014 Notice of Hearing

³ Although the Contract is signed only by the Claimant, the Respondent presented no evidence that this was not the Contract entered into between the Claimants and him.

⁴ Fund Ex. 7, which the Respondent identified as the warranty for the flooring, was not submitted into evidence.

- Fund Ex. 4 August 19, 2014 Notice of Hearing
- Fund Ex. 5 June 25, 2014 licensing history
- Fund Ex. 6 June 17, 2013 letter from the MHIC to the Respondent, enclosing the June 26, 2013 Home Improvement Claim Form, with attachment⁵

Testimony

The Claimant testified on behalf of the Claimants.

The Respondent testified and presented the testimony of David Day, Account Executive, JJ Haines.

The Fund did not present the testimony of any witnesses.

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 numbers 01-87461 and 05-122346.
2. On June 18, 2010, the Claimants and the Respondent entered into a Contract for the Respondent to install wood flooring, including wood molding, in the living room, dining room, kitchen, hall, and entrance, and to install vinyl flooring in the laundry room of the Claimants' home. (CL Ex. 3.) Specifically, the Respondent agreed to install the following:

<u>Manufacturer</u>	<u>Style</u>	<u>Color</u>	<u>Size</u>	<u>Total Units</u>
Bruce	Turlington	Natural	3" wide	650 sq. ft.
Congoleum	Prelude	Natural Oak 02055	12' X 8' 6"	

3. The Contract did not state when work would begin or end.
4. The original agreed-upon contract price was \$4,206.68.
5. The Claimants paid the Respondent \$1,893.00 on June 18, 2010.

⁵ For unexplained reasons, this attachment differs from the attachment in CL Ex. 8.

6. The Respondent began work on July 25, 2010, including installing a vapor barrier and checking for moisture content, which he found to be eight to ten percent.

7. The Respondent completed the work on or about July 26, 2010.⁶

8. The manufacturer's specifications for the flooring installed by the Respondent provide in pertinent part as follows:

INSTALLERS – ADVISE YOUR CUSTOMER OF THE FOLLOWING

Seasons: Heating and Non-Heating

Recognizing that hardwood floor dimensions will be slightly affected by varying levels of humidity within your building, care should be taken to control humidity levels within the 35-55% range. To protect your investment and to assure that your floors provide lasting satisfaction, we have provided our recommendations below.

- **Heating Season (Dry):** A humidifier is recommended to prevent excessive shrinkage in hardwood floors due to low humidity levels. Wood stoves and electric heat tend to create very dry conditions.

(CL Ex. 13.)

9. The Respondent provided the Claimants with a copy of the manufacturer's warranty, which advised that the use of a humidifier may be necessary to maintain the proper humidity level of between thirty-five to fifty-five percent.

10. The Claimants paid the Respondent \$4,206.68 on July 26, 2010.

11. After work began, the Claimants noticed that the wood flooring installed by the Respondent in the kitchen and in the hallway to the bedrooms and bathrooms was wobbly and made creaking sounds when walked on.

12. On December 16, 2010, the Claimants filed a Complaint with the MHIC against the Respondent.

⁶ This information was gleaned from the December 16, 2010 Complaint Form.

13. In March 2011, the Respondent met at the home with an MHIC investigator.

14. On or about March 30, 2011, the Respondent advised the MHIC that he would perform corrective work on the home on or before May 13, 2011.

15. The Respondent performed some additional work, which was not to the Claimants' satisfaction.⁷

16. On or about August 25, 2011, the Respondent advised the MHIC that he would "return and correct the discrepancies within 30 days." (CL Ex. 7.)

17. On or about October 28, 2011, the Respondent took up flooring and reinstalled new flooring in the kitchen and hallway.

18. Sometime after October 28, 2011, the Claimants observed gaps between the boards in the kitchen, hallway, and dining room, and between the flooring and the molding.

19. Mr. Crist wrote to the Respondent on January 22, 2013, stating that "the wood flooring . . . is becoming loose and shifting. There are gaps between the flooring strips, at the ends. These separations are quite wide in some areas. . . . I know that you would want to be made aware of this condition." (Fund Ex. 6.)

20. Sometime in January 2013, Mr. Crist advised the Respondent that the Claimants would pursue a claim against him unless he corrected the condition of the wood flooring.

21. When the Respondent met with Mr. Crist at the home shortly after January 22, 2013, he observed 1/8th to 1/16th inch gaps between boards in the hallway adjacent to the "heating room." Mr. Crist also complained at that time that the flooring was "shifting." The Respondent told Mr. Crist that he would contact the Armstrong flooring representative (JJ Haines) to look at the Armstrong flooring he had installed.

⁷ Neither party made clear exactly what work was performed.

22. David Day, Customer Representative, JJ Haines, met with the Respondent and Mr. Crist at the home in March 2013. At that time, Mr. Day observed separations between the boards in the kitchen and hallway. He took moisture readings and took some flooring samples with him. He subsequently advised the Respondent that there were no manufacturing problems with the flooring and that “the product’s moisture was 4-6% (low).” (Resp. Ex. 2.) (Resp. Ex. 2.)

23. On June 8, 2013, a representative from Sears observed buckling, squeaking, gaps and fading of the wood flooring.

24. The Respondent told Mr. Crist that the problems with the flooring were caused by low moisture levels and to use a humidifier.

25. On June 26, 2013, the Claimants filed a claim against the Fund.

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).

This case relates to a June 18, 2010 Contract between the Claimants and the Respondent for the installation of wood flooring in the Claimants’ home. In their Complaint, the Claimants contended that after July 25, 2010, they noticed that the flooring installed by the Respondent in the kitchen and in the hallway to the bedrooms and bathrooms “was infirm, wobbly and made creaking sounds when walked on.” (CL Ex. 8.) They further contended that “as time elapsed from 2010 to 2013 and beyond, the flooring is getting worse.” Finally, the Claimants contended

that when the Respondent installed the wood flooring in the home, he used a form of tar paper as a liner under the flooring rather than two layers of special liners for moisture protection as called for by the manufacturer's specifications.

The Respondent contended that he properly installed the wood flooring, according to manufacturer's specifications.

For the following reasons, I find that the Claimants have not proven eligibility for compensation.

License

Initially, I find that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants, based on the licensing information submitted into evidence by the Fund.

Unworkmanlike, Inadequate Home Improvement

For the following reasons, I find that the Claimants failed to prove by a preponderance of the evidence that the Respondent performed unworkmanlike and inadequate home improvements.

Claimants

The Claimant testified that the wood flooring installed by the Respondent in the kitchen, hallway, dining room, and hallway of the home has large spaces between the wood, and between the wood and the molding, and is "wobbly" and "bouncy." In addition, the Claimant testified that she never saw the Respondent apply glue or sealant to the floor.

According to the Claimant, the Respondent came to the home twice after the Claimants contacted the MHIC to attempt repairs; however, the floor was in an even worse condition after those attempts. Mr. Crist contacted the Respondent again and advised him that he would pursue

the claim with the MHIC unless the condition was corrected, but the Respondent failed to return and told Mr. Crist in January 2013, "Do what you will."

The Claimants submitted into evidence photographs of the wood flooring which she testified were taken shortly after installation showing gaps between the boards and photographs of gaps between the flooring and the molding, which she said were taken after repairs.

The Claimant further testified that on June 8, 2013, she obtained an estimate from Sears to replace the entire flooring at a cost of \$13,550.00.⁸ An Inspection Survey attached to the estimate noted buckling, squeaking, gaps and fading of the wood flooring.

On September 4, 2014, the Claimant obtained an estimate from Next Day Floors for "replacement due to improper installation of Bruce [engineered] locking hardwood for \$5,773.30 including taking up the existing floor in the den, kitchen, hallway and closets, moving appliances, and installing new flooring using the existing one-fourth round molding." (Cl Ex. 10.)

The Claimant obtained a third estimate on September 2, 2014 from Priceless in the amount of \$4,863.78 provided by "Sales rep" Thomas Coker, which states, "[e]xisting hardwood floor was installed incorrectly and will require replacement in the hallways, kitchen and sitting room in order to effectively correct the problem that is currently being experienced."⁹ (CL Ex. 11.)

The Claimants also submitted into evidence a March 27, 2013 letter from Armstrong, which indicated that after taking samples of the wood product installed, Armstrong determined that they showed no manufacturing defects.

⁸ Sears was unwilling to attempt repairs and would only agree to replace the entire floor.

⁹ That estimate was itemized but did not include an MHIC number.

When asked upon cross examination by the Respondent if it was true that he put a vapor barrier over the vinyl, the Claimant testified that the Respondent told her that there was no vapor barrier, then said he would return her money to her, and then said, "No, I will fix it." She could not remember when he made those alleged comments, however.

Respondent

The Respondent testified that he finished the job at the Claimants' home in July 2010 but heard of no problems with his work until February 2011 after they complained to the MHIC. He met at the home with an MHIC investigator who he said pointed out some buckling along the back wall in the kitchen. Although the Respondent felt that the problem was a moisture problem, he nonetheless agreed to take up that flooring and reinstall new flooring in the kitchen and hall, which he did on or about October 28, 2011. The Respondent testified that he saw no other problems and that the Claimant stated that everything else was fine.

According to the Respondent, he did not hear from the Claimants again until Mr. Crist contacted him on January 22, 2013 complaining about separations in the wood. He "immediately" met with Mr. Crist and observed 1/8th to 1/16th inch gaps between boards in the hallway adjacent to the "heating room." Mr. Crist also complained at that time that the flooring was "shifting." The Respondent subsequently contacted Armstrong's flooring representative (JJ Haines) to look at the flooring. David Day, Customer Representative, JJ Haines, met with the Respondent and Mr. Crist at the home in March 2013. According to the Respondent, there was no buckling or wobbling in the flooring at that time. There were separations between the boards in the kitchen and hallway. Mr. Day took moisture readings and took some flooring samples with him. Approximately four weeks later, Mr. Day sent a letter stating that there were no manufacturing problems with the flooring.

The Respondent submitted into evidence a May 10, 2013 e-mail from Mr. Day copying an undated letter from Jeremy Lakeman, Technical Services Manager, Armstrong, stating that no defects were present in the samples and that “the product’s moisture was 4-6% (low).” (Resp. Ex. 2.) The letter further stated:

Gapping has a number of possible causes, excessive job site moisture prior to install, low RH,¹⁰ and possibly subfloor movement as a result of not acclimating the subfloor to home conditions just to name a few. . . . When a claim is submitted we determine if the product is defective and performing to manufacturing specifications, we cannot always provide the direct cause simply because we were not present at the installation, and we do not know all of the conditions at the time of the installation, nor do we know what has transpired between the time of the installation and the time the claim has been submitted.

(Resp. Ex. 2.)

The Respondent also submitted into evidence an unsigned undated letter, which he testified he subsequently received from Mr. Day stating his conclusion that “the claim was neither a manufactures nor an installer’s issue (sic). It was found that the hardwood had very low levels of moisture that could be corrected by the use of a humidifier.” (Resp. Ex. 1.) The letter further states, “The wood is separating and shrinking because of the lack of moisture in the air. I have been out and viewed 100’s of claim for Armstrong throughout my career and I wanted to assure you that I found no installation issue that would have caused Mr. Christ’s problems (sic).” (Resp. Ex. 1.)

The Respondent testified that it was his opinion that the gaps in the flooring were caused by low humidity, probably due to its location near a heating unit, which caused the flooring to dry out over time. He testified that the told Mr. Crist that the problems with the flooring were caused by low moisture levels and told him to use a humidifier.

¹⁰ None of the parties explained this abbreviation. I assume, based upon questions posed at the hearing that it refers to “relative humidity.”

On cross-examination by the Claimants' counsel, the Respondent disagreed that the manufacturer's specifications called for the use of glue when installing wood flooring over tile and testified that it is proper to install a "floating" floor over a vinyl floor.

The Respondent at first testified that the normal moisture level for the product installed by him is ten to twelve percent. On cross-examination by counsel for the Fund, however, the Respondent testified that he took a moisture reading at the time of installation and that it was eight to ten percent, which he testified is "standard for wooden floors." He acknowledged that "moisture content" is different from "relative humidity." The Respondent also acknowledged that Armstrong's warranty indicates that relative humidity should be 35-55% and indicates that the use of a humidifier may be necessary. The Respondent admitted that he did not check the humidity level before he installed the floor. The Respondent could not recall if he told the Claimants at the time of installation to run a humidifier but stated that he gave them a copy of the warranty recommending that they do so and argued that "everyone knows you need to run a humidifier."

David Day testified that when he inspected the flooring in the Claimants' home in late February 2013, Mr. Crist was "unhappy with the shrinkage of the wood, *i.e.*, gaps in the kitchen and hallway. Mr. Day testified that he observed no other damage at that time. He further testified that Armstrong found no manufacturing defects in its testing of floor samples taken. Humidity readings were low in the kitchen (30-35%), which Mr. Day attributed to "something in the room causing the humidity to be sucked up – usually a heater or air conditioner." He contended that if the floor was replaced, the condition would happen again if nothing changes. He further testified that glue is not used in the installation of the type of flooring in question.

When asked on cross-examination if there were other possible causes for the gaps, Mr. Day testified that gaps can result from the condition of subflooring or if there was too much

space left between the flooring and the walls. Mr. Day also testified that 33-55% is the proper humidity level for the flooring installed by the Respondent; that gapping can be caused by poor installation; that it is possible that humidity can escape through hardwood floors if there is no moisturizing barrier; and that the flooring should meet the molding.

Mr. Day acknowledged upon cross-examination that he is a salesperson and that he has no construction experience and is not an expert in hardwood flooring

Analysis

The Claimant presented as sincere but somewhat vague on details. I do not doubt that there is some buckling of and gaps in the flooring installed by the Respondent and that it will cost \$5,773.30 to repair based on the estimate from Next Day Flooring. The Claimants failed to prove by a preponderance of the evidence, however, that those conditions were caused by the Respondent's unworkmanlike, inadequate or incomplete home improvements. They presented no expert testimony or even a reliable report from a home improvement contractor or flooring installer to establish that the Respondent should have, but did not, glue the floor down. Such evidence was also not presented to establish that the Respondent should have done a relative humidity reading and that such a reading at the time of installation would have shown an unsatisfactory range.

The Claimants also presented insufficient evidence to dispute the Respondent's testimony that he installed a vapor barrier. I did not place weight on the Claimant's testimony that the Respondent told her that he did not put down a vapor barrier. She did not offer that information until cross-examined by the Respondent after her rebuttal testimony and she could not remember when he allegedly made that statement.

There were some broad references in estimates submitted with regard to repairing improper installation, but I have no way of knowing the expertise of the individuals who made those references or on what foundation those opinions were based.

The Respondent speculated that the problems with the floor are as a result of low moisture problems in the home, possibly from a nearby heating or air conditioning unit. It was the Respondent's undisputed testimony that he gave Mr. Crist a copy of the warranty recommending the use of a humidifier and noting the proper relative humidity level to be maintained.

A preponderance of the evidence supports the Respondent's assertion that the gaps developed over time. The Claimants did not specifically mention gaps in their June 26, 2013 Complaint, but stated that "as time elapsed from 2010 to 2013 and beyond, the flooring is getting worse." (CL Ex. 8.) The first mention in the documentary evidence of any gaps was in the Sears June 2013 Inspection Survey. In addition, Mr. Crist's January 22, 2013 letter to the Respondent corroborates the Respondent's assertion that the Claimants never before told him about the gaps. In that letter, Mr. Crist states, "There are gaps between the flooring strips I know that you would want to be made aware of this condition." (Fund Ex. 6.)

Even if I found reliable the Claimant's testimony that photographs showing gaps in the hallway floor were taken at the beginning of the installation, the evidence shows that the flooring in that location was subsequently replaced. With regard to the photographs showing two gaps between the flooring and molding, the Claimant's testimony established only that they were taken some time after the October 2011 repairs.

Although on rebuttal, the Claimant testified that she was unaware of any moisture issues in the home, I find that such issues may not have been obvious to her.

Because the Claimants failed to present sufficient evidence, I am left to speculate as to the cause of the buckling and gaps and as to whether the Respondent caused or contributed to those conditions. I do have a concern about two gaps shown in photographs between the flooring and the molding, which the Claimant testified are one half inch to one inch wide. Nonetheless, a great deal of time passed between the date the Respondent performed the repair work (October 2011) and the time the Claimants notified him of the gaps (January 2013). I can only speculate as to what occurred during that period of time that might have caused those gaps. In any event, the estimates submitted by the Claimants do not enable me to determine the cost to repair just the gaps between the flooring and molding.

I thus find that the Claimants are not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have not sustained an actual and compensable loss 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 Guarantee Fund deny the Claimants' claim; and

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

Signature on File

December 3, 2014
Date Decision Issued

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#153142