

<b>IN THE MATTER OF THE CLAIM</b>	*	<b>BEFORE LORRAINE E. FRASER,</b>
<b>OF TRACY DAVIS,</b>	*	<b>AN ADMINISTRATIVE LAW JUDGE</b>
<b>CLAIMANT</b>	*	<b>OF THE MARYLAND OFFICE</b>
<b>AGAINST THE MARYLAND HOME</b>	*	<b>OF ADMINISTRATIVE HEARINGS</b>
<b>IMPROVEMENT GUARANTY FUND</b>	*	
<b>FOR THE ALLEGED ACTS OR</b>	*	
<b>OMISSIONS OF CARL KINDIG,</b>	*	
<b>T/A TECHNIQUES HOME</b>	*	<b>OAH No.: DLR-HIC-02-15-26666</b>
<b>IMPROVEMENTS &amp; MAINTENANCE,</b>	*	<b>MHIC No.: 13 (90) 645</b>
<b>RESPONDENT</b>	*	

\* \* \* \* \*

**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 March 20, 2014, Tracy Davis (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,256.00 in alleged actual losses suffered as a result of a home improvement contract with Carl Kindig, trading as Techniques Home Improvements & Maintenance (Respondent).

I held a hearing on September 23, 2015 at the Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

(2015).<sup>1</sup> The Claimant represented herself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent failed to appear. Notice of the hearing was sent to the Respondent's address of record via regular and certified mail. The certified mail was returned as unclaimed; the regular mail was not returned.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (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 any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

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

- Cl. Ex. 1 Contractor Agreement, 1/31/10; Specifications Exhibit A, 9/7/09; architectural drawings, 8/26/09
- Cl. Ex. 2 Invoice, 8/6/10; invoice, 6/6/10; invoice, 5/6/10
- Cl. Ex. 3 Cancelled checks: 1/31/10 for \$8,000.00; 3/19/10 for \$8,000.00; 4/5/10 for \$9,000.00; 5/7/10 for \$17,000.00; 6/16/10 for \$6,000.00
- Cl. Ex. 4 Emails between the Claimant and the Respondent, 4/25/11-7/5/11
- Cl. Ex. 5 Complaint Form, 12/11/12
- Cl. Ex. 6 Letter from the Respondent, 1/4/10; Permit Status Display, 1/19/10

---

<sup>1</sup> Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

- Cl. Ex. 7 Letter to the Respondent from MHIC, 3/13/13
- Cl. Ex. 8 Complaint Form, 10/17/13
- Cl. Ex. 9 Letter to the Claimant from MHIC, 5/29/14; Notice of Hearing, 7/28/14; Hearing Order, 5/29/14; Request for Postponement, 10/9/14; Notice of Hearing, 10/30/14; letter to the Claimant's husband from MHIC, 12/2/14; Agency withdrew/rescinded action, 11/10/14
- Cl. Ex. 10 Emails between the Claimant's husband and counsel for the Respondent, 12/18/14; certified mail receipt; returned certified mail envelope; letter to the Respondent from the Claimant's husband, 2/23/15; letter to the Respondent from MHIC, 3/27/15; letter to the Respondent from MHIC, 4/16/15
- Cl. Ex. 11 Report, Russell W. Allen, AA Home Inspection Service, Inc., 6/27/13
- Cl. Ex. 12 Invoice, C. Mayes Plumbing & Heating, 10/6/14; 3 photographs
- Cl. Ex. 13 Estimate for roof, Homefix Custom Remodeling, 9/8/14
- Cl. Ex. 14 Estimate for roof, Brothers Services Company; 7 photographs
- Cl. Ex. 15 Contract, One Day Roofing & More, 11/19/14
- Cl. Ex. 16 34 photographs of exterior roof taken by One Day Roofing & More, 12/2/14
- Cl. Ex. 17 4 photographs of interior roof and ceiling, taken 2/19/14

The Respondent did not offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, 8/10/15; unclaimed certified mail (Hearing Order, 8/6/15)
- Fund Ex. 2 Hearing Order, 8/6/15
- Fund Ex. 3 Licensing History, 8/26/15
- Fund Ex. 4 State Department Assessments and Taxation real property search for 1201 Pony Trail Circle, Edgewater, Maryland 21037
- Fund Ex. 5 Home Improvement Claim Form, 3/20/14
- Fund Ex. 6 Letter to the Respondent from MHIC, 4/22/14

## Testimony

The Claimant testified and presented the testimony of Russell W. Allen, President, AA Home Inspection Service, Inc., who was accepted as an expert in home improvement.

The Respondent did not present any witness testimony.

The Fund did not present any witness 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 37703.
2. On January 31, 2010, the Claimant and the Respondent entered into a contract to build a new 16 x 32 foot addition on her home, including a bedroom, bathroom, closet, and foyer. The contract stated that work would begin within twenty-one days of signing the contract and would be substantially completed within ninety days from the start date.
3. The contract referred to architectural drawings and included: demolition, a foundation with a crawl space and sump pit, footings, framing, roofing, siding, insulation, drywall, heating, ventilation, and air conditioning (HVAC), plumbing for the bathroom, electric, interior and exterior doors, windows, trim, paint, stairs, flooring, and tile. The contract did not include: lighting fixtures, towel bars and bath accessories, hard wired smoke detectors, landscaping, driveway paving, or sidewalks.
4. The original agreed-upon contract price was \$56,000.00.
5. The Respondent started work on the addition in February 2010 and worked until July 2010.

6. In July 2010, the Claimant noticed that the front (exterior) door was not hung correctly, the ceiling and walls in the addition were cracking, and the grout around the tile in the bathroom was stained. She asked the Respondent to correct these problems.

7. The Respondent returned to the Claimant's home sometime in August or September. He installed crown molding to cover the cracks where the ceiling and walls met and removed and re-grouted a portion of the tile in the bathroom.

8. In October 2010, the Claimant discovered that the floor of the addition was not level but sloped down. She noticed cracks in the grout in the tiled foyer, cracks in the grout in the bathroom walls, and cracks around the door in the foyer. She also noticed additional cracks in the middle of the bedroom ceiling and walls, not where they joined. In addition, she noticed water damage in the foyer near the attic steps and around a light fixture and vent in the hallway.

9. Sometime in November or December 2010, the Respondent put shims under the addition's floor to stop the bowing, which did not work. The Respondent did not return to the Claimant's home after this visit.

10. Sometime thereafter, the Claimant and her husband contacted the Respondent asking him to correct the problems with his work.

11. On April 25, 2011, the Respondent demanded payment and claimed he had completed the punch list.

12. On June 27, 2011, the Claimant asked the Respondent to make the floor in the bedroom level, correct the gap between the front door and door jam, and repair the cracked grout in the shower floor and foyer. The Respondent replied that he had made all the repairs and demanded payment.

13. In December 2012, the Claimant discovered that the roof installed by the Respondent was leaking. The roof sheathing was wet and she could see water running into the attic when it was raining.

14. On May 24, 2013, Russell Allen, AA Home Inspection Service, Inc., inspected the addition built by the Respondent.

15. The following defects existed at the time of Mr. Allen's inspection: 1) The floor joists were not supported properly or fastened securely to prevent movement. As a result, the floor joists and framing moved, causing deterioration of the tile and grout in the foyer and bathroom. 2) There was water in the crawl space and no sump pump to drain the area. 3) There was construction debris in the crawl space. 4) The HVAC ducts in the attic were kinked and sagging. The flex duct in the attic from the bathroom was not insulated. 5) The front porch stair handrail was twenty-seven inches high but should have been between thirty-four and thirty-eight inches high. 6) House wrap and flashing were not installed around all doors and windows and where the exterior porch attached to the wall to prevent water entry. 7) The insulation on the refrigeration (HVAC) suction lines was damaged and the condensing unit suction lines were not insulated. 8) The openings around the PVC waste line and air conditioning lines were not sealed where they passed through the foundation. 9) There was no insulation around the pipes in the crawl space. 10) Flashing on the roof was missing where the roof joined the vertical wall on the addition.

16. Mr. Allen estimated that it would cost \$21,763.00 to correct all the problems identified in his report.

17. On November 19, 2014, the Claimant hired One Day Roofing to repair the roof on the addition. While repairing the roof, One Day Roofing discovered there was no ice barrier,

there were loose shingles, the roof was not flashed correctly, and there was water running into the house. Water damage was visible on the wood sheathing. The Claimant paid \$4,465.00 for the repair. The roof has not leaked since it was repaired.

18. The Claimant paid the Respondent the following amounts: January 31, 2010 \$8,000.00; March 19, 2010 \$8,000.00; April 5, 2010 \$9,000.00; May 7, 2010 \$17,000.00; June 16, 2010 \$6,000.00; for a total of \$48,000.00.

19. As of August 6, 2010, after a series of credits, debits, and additional charges, the Claimant owed the Respondent \$3,507.00 as final payment under the contract. Meaning, the original contract price of \$56,000.00 was reduced to \$51,507.00.

20. The Claimant did not pay the Respondent the outstanding balance of \$3,507.00.

21. The Claimant's actual loss is \$18,256.00.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002) (quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000)).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). *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.” Bus. Reg. § 8-401. 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 performed unworkmanlike, inadequate or incomplete home improvements on the Claimant’s home in 2010. The Claimant was aware that there were some problems with the Respondent’s work in 2010, which she asked him to correct, but he refused to do so. However, the Claimant did not learn of the full extent of the problems with the Respondent’s work until she hired Mr. Allen to inspect the work in 2013. Mr. Allen discovered the defects described above in the findings of fact, almost all of which were not visible to the Claimant and/or were defects that required some expertise to identify. The most significant defects in the Respondent’s work were the inadequate structural support in the floor joists and the leaking roof. Mr. Allen testified in detail about the problems he observed and explained that the inadequate structural support was causing the cracking in the tile flooring and the missing flashing caused the roof to leak. He said that the missing house wrap and flashing around the doors and windows would allow water to enter. Mr. Allen stated that the Respondent’s attempt to fix the uneven floor by shimming the floor joists was improper; floor joists cannot be shimmed. Rather, the sill plate must be leveled, then the girder must be leveled, finally the joists must be leveled and straps and hangers must be installed. Mr. Allen estimated that it would cost \$21,763.00 to repair the Respondent’s unworkmanlike work. Thus, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of 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. 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).

The Claimant's actual loss is calculated as follows:

Amount paid to the Respondent	\$48,000.00
Cost to repair the work	<u>+21,763.00</u>
	69,763.00
Amended contract price	<u>-51,507.00</u>
Actual loss	\$18,256.00

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405 (e)(1), (5).

The Claimant paid \$48,000.00 to the Respondent, which is more than her actual loss of \$18,256.00, computed using the formula in COMAR 09.08.03.03(c). Accordingly, the Claimant is entitled to reimbursement of \$18,256.00. Bus. Reg. § 8-405 (e)(5).

#### **PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$18,256.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$18,256.00; 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;<sup>2</sup> and

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

**Signature on File**

December 14, 2015  
Date Decision Issued

Lorraine E. Fraser  
Administrative Law Judge

LEF/kc  
# 159435

<sup>2</sup> See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 28th day of January, 2016, 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.***

***Joseph Tunney***

***Joseph Tunney  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**