

IN THE MATTER OF THE CLAIM OF	* BEFORE MICHAEL D. CARLIS,
WENDELL J. WILSON	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED MISCONDUCT OF	*
MICHAEL THOMAS KERN, T/A	*
MTK ENTERPRISES, INC.,	* OAH No.: DLR-HIC-02-09-34622
RESPONDENT	* COMPLAINT No.: 07 (75) 1670

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On June 12, 2007, Wendell Wilson, Jr. (Claimant), filed a claim before the Maryland Home Improvement Commission (MHIC) for compensation from the Guaranty Fund (Fund). The claim was against Michael Thomas Kern, trading as MTK Enterprises, Inc. (Respondent), for an actual loss of \$19,162.00. On August 24, 2009, the MHIC ordered a hearing.

On July 8, 2010, I held a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) & 8-407(c)(2) (2010).<sup>1</sup> Craig H. DeRan, Esquire, and Stark and Keenan, represented the Claimant. The Respondent did not

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<sup>1</sup> All subsequent references to the Business Regulation Article of the Annotated Code of Maryland are to sections only.

appear at the hearing. Kris M. King, Assistant Attorney General, and the Office of the Attorney General, represented the MHIC Fund.

The contested case provisions of the Administrative Procedure Act; the procedural regulations of the Department of Labor, Licensing and Regulation; and the Rules of Procedure of OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03 and 09.08.03; COMAR 28.02.01.

### ISSUES

The issues are (1) whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement<sup>2</sup> that caused the Claimant an actual loss; and, if so, (2) whether the amount of the compensable actual loss is the amount that the Claimant has claimed.

### SUMMARY OF THE EVIDENCE

#### Exhibits

The following were admitted for the Claimant:

- Claimant #1: Contractor Agreement, dated June 7, 2006;
- Claimant #2: Building Inspection notice;
- Claimant #3: Letter to the Respondent, dated September 17, 2007;
- Claimant #4: Letter to the Claimant, dated October 18, 2007;
- Claimant #5: Contract, dated January 6, 2008;
- Claimant #6: Invoice, dated December 14, 2007; and
- Claimant #7(a-h): Photographs.

The following were admitted for the Fund:

- Fund #1: Memorandum to Legal Services, including Notice of Hearing and Hearing Order, dated May 25, 2010;

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<sup>2</sup> A "home improvement" is "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[.]" Section 8-101(g)(1)(xi).

- Fund #2: Memorandum to Legal Services, including Notice of Hearing and Hearing Order, dated July 8, 2010;
- Fund #3: Licensing information;
- Fund #4: Real Property Data Search results;
- Fund #5: Home Improvement Claim Form; and
- Fund #6: Letter to the Respondent, dated July 13, 2007.

### Testimony

The following testified for the Claimant: Charlotte J. Wilson, his wife; Jeffrey James Deegan, a Civil Engineer; and Brian E. Kidd, a General Contractor, admitted as an expert in residential construction.

The MHIC Fund offered no witnesses.

### **FINDINGS OF FACT**

I find the following by a preponderance of the evidence:

1. At all times relevant herein, the Respondent was licensed as a home improvement contractor under registration number 90855.
2. On June 7, 2006, the Claimant and Respondent entered into a home improvement contract<sup>3</sup> (Contract). The Respondent agreed to construct a carport and to build roofs over the front and back porches of the Claimant's residence. The Claimant agreed to pay \$15,165.00.
3. The Respondent began work on the home improvement in September 2006. He finished the footers and part of the framing for the carport before he abandoned the home

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<sup>3</sup> A "home improvement contract" is "an oral or written agreement between a contractor and owner for the contractor to perform a home improvement." Section 8-101(h). An "owner" is a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement. Section 8-101(k).

improvement without further work in December 2006. The Claimant paid \$10,110.00 to the Respondent.

4. The Respondent's work on the home improvement was inadequate and unworkmanlike. None of the foundational or structural work was safe.
5. On January 8, 2008, the Claimant executed a contract with B.E. Kidd, Inc. (Kidd) to demolish the Respondent's unsafe work and to construct the carport. Kidd finished the home improvement. The Claimant paid \$28,850.00 to or on behalf of Kidd.
6. The amount paid by the Claimant to or on behalf of Kidd to build the carport was reasonable.
7. The Claimant's actual loss was \$23,795.00.

### DISCUSSION

#### General Law

Under section 8-405(a), the MHIC Fund may compensate an "owner . . . for an actual loss that results from an act or omission by a licensed contractor[.]" Compensation is "only . . . for actual losses [an owner] incurred as a result of misconduct by a licensed contractor."

COMAR 09.08.03.03B(2). "Actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."

Section 8-401.

#### Summary of the Evidence

Mrs. Wilson lives with the Claimant in their home in Baltimore County.<sup>4</sup> On June 7, 2006, they executed the Contract with the Respondent for the construction of a carport and roofs over their front and back porches.

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<sup>4</sup> Sometimes I refer to the Claimant and Mrs. Wilson as the "Claimants," "they," or "them."

The Contract specifically provides for the Respondent (i) to construct a "carport with hip roof, with some additional alteration, and (ii) to "[b]uild [a] wooden roof over front porch." The Claimants agreed to pay \$15,165.00. Claimant #1.

Mrs. Wilson testified that the Respondent began work on or about September 16, 2006, but only partially dug the holes for the footers. According to Mrs. Wilson, the Respondent finished the footers. Although an issue with the footers arose with a building inspector, it was resolved.

Mrs. Wilson further testified that the Respondent's subsequent work on the home improvement was slow. The Respondent stopped work altogether in December 2006. A county building inspector disapproved the Respondent's incomplete work. Claimant #2.

Mrs. Wilson testified that she tried to contact the Respondent "several" times during December and January, but "it was like he disappeared." After the holidays, she again tried to contact the Respondent "over fifteen times" without success. They never heard from the Respondent again. According to Mrs. Wilson, they paid \$10,110.00 to the Respondent.<sup>5</sup>

Finally, Mrs. Wilson testified that the Claimants paid \$27,000.00 to Kidd to demolish the Respondent's inadequate work and build the carport. Claimant #5 is the home improvement contract between the Claimant and Kidd. According to Mrs. Wilson, they also paid \$1,882.50 to Mr. Deegan for engineering and design services relied upon by Kidd to complete the home improvement. Claimant #6 is a copy of Mr. Deegan's invoice for his services.

Mr. Deegan testified that he evaluated the Respondent's work. According to Mr. Deegan, "every connection that was made throughout the whole carport was inadequate." He

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<sup>5</sup> The Claimants did not offer any documentary proof of the payment. Mrs. Wilson testified that she contacted her bank for copies of the checks from 2006, but was unable to get them before the hearing. The Contract calls for \$5,055.00 as a deposit, \$5,055.00 "at the start of the job," and \$5,500.00 when the job was finished. Mrs. Wilson was a credible witness. I am satisfied, based on her testimony, that the Claimant paid \$10,110.00 to the Respondent.

identified specific inadequacies and summarized the Respondent's work as "not in accordance with industry standards" and "the whole structure was unsafe." He further testified that he recommended that Kidd demolish the Respondent's work, including the footings, because "not one element of that structure . . . was safe." Mr. Deegan testified that the Claimant paid his entire fee.

Mr. Kidd testified that he evaluated the Respondent's work. It was "on the verge of falling down." He described the status of the work in a letter to the Claimants as follows:

The Carport, as it stands is unsafe and will at some point, pose a hazard to you and anyone visiting your home. The structural members supporting the roof system itself, is inadequate, undersized, and improperly joined, and, under a change in loading, due to snow or wind, may fail, causing severe consequences to both persons and/or property.

As . . . can be readily seen, [the work] is not done in accordance with industry standards or good construction practice. The work that has been accomplished to date will not pass inspection . . . . The supplemental support system required to make the structure safe will further detract from the aesthetics and functionality of the structure and not accomplish the desired goals for which you originally contracted.

Claimant #4.

Mr. Kidd testified that the demolition of the Respondent's work was "absolutely" necessary. According to Mr. Kidd, he could not repair the Respondent's work, in part, because his "reputation would suffer." He opined that the work described in the Respondent's contract could not be done in a workmanlike manner for \$15,000.00. Further, he testified that his proposal included less expensive materials and excluded the roofs, which were part of the Contract. According to Mr. Kidd, his price was reasonable and based on his experience and industry standards. Finally, Mr. Kidd testified that the Claimants paid him the full contract price for Kidd's completion of the project.

Analysis

None of the Claimant's evidence was refuted. Based on Mrs. Wilson's testimony, the Claimant paid \$10,110.00 to the Respondent to build a carport and roofs over the porches. Based on Mrs. Wilson's testimony, the Respondent abandoned the incomplete home improvement. Based on the testimony of Mrs. Wilson, Mr. Deegan, and Mr. Kidd, and Claimant #2, and Claimant #4, the Respondent's work was inadequate and unworkmanlike. Furthermore, based on the testimony of Messrs. Deegan and Hill and Claimant #4, none of the Respondent's incomplete work was salvageable. Based on the testimony of Mrs. Wilson and Mr. Hill and Claimant #1 and Claimant #5, the Kidd proposal did not exceed the scope of the original proposal, and based on the testimony of Mr. Kidd, the cost of the Kidd proposal was reasonable. Finally, based on the testimony of Mrs. Wilson and Messrs. Kidd and Deegan, the Claimant paid \$28,850.00 to demolish the Respondent's work and build the carport.

On June 12, 2007, the Claimant filed a claim for \$19,612.00:<sup>6</sup>

1. Date of original contract:	<u>June 7<sup>th</sup>, 2006</u>
2. Date work done by contractor:	<u>Sept. 18, 2006</u>
3. Amount of original contract:	<u>\$15,165.00</u>
4. Amount of any changes to the original contract:	<u>-0-</u>
5. Total amount of lines 3 and 4:	<u>\$15,165.00</u>
6. Amount paid to or on behalf of the contractor:	<u>\$10,110.00</u>
7. Estimated value of the work done by the contractor:	<u>-0-</u>
8. Subtract line 7 from line 6:	<u>\$10,110.00</u>
If the contractor did not do any work on your contract, or if you do not intend to contract with another contractor to correct or complete the work done in the original contract, then this is the Amount of your claim. Enter this amount on line 11. If you have contracted or intend to contract with another contractor, go to line 9.	
9. Amount paid or payable to restore, repair, replace or complete work done by the original contractor, which is poor or unworkmanlike or otherwise inadequate or incomplete:	<u>\$24,217.00</u>
10. Amount of claim. Add amounts on line 6 and 9 and subtract the amount on line 5:	<u>\$19,162.00</u>

<sup>6</sup> The calculation is on the MFHC's standard claim form.

11. Enter claim amount from either line 8 or 10: \$19,612.00<sup>7</sup>

Fund #3.

COMAR 09.08.03.03B governs the calculation of actual loss, as follows:

B. Measure of Awards from Guaranty Fund.

...

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

Because the Claimant had Kidd complete the home improvement, COMAR 09.08.03.03B(3)(c) determines his actual loss. Under Regulation .03B(3)(c), the Claimant's actual loss is calculated as follows: \$10,110.00 (the amount paid under the original contract) + \$28,850.00 (a reasonable amount paid to another contractor to repair and complete the original contract) = \$38,960.00 – \$15,165.00 (the original contract price) = \$23,795.00.

At present, Section 8-405(e)(1) limits an award from the MHIC Fund to no "more than \$20,000.00 to one claimant for acts or omissions of one contractor."<sup>8</sup> This statute has been

<sup>7</sup> The Claimant reversed the numbers "1" and "6."

<sup>8</sup> At the hearing, the Fund recommended an award of \$20,000.00.



amended, effective October 1, 2010, to include subsection (e)(5), which reads: "The Commission may not award from the [MHIC] Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Therefore, if the MHIC issues a final decision on or after the effective date of the amendment, the Claimants' award shall be limited to the amount the Claimants paid to the Respondent (\$10,110.00). See *Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 261-262, 839 A.2d 743, 755 (2003); *McComas v. Criminal Injuries Comp. Bd.*, 88 Md. App. 143, 151, 594 A.2d 583, 586 (1991).

#### **CONCLUSION OF LAW**

The Claimant has sustained an actual loss of \$23,795.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

#### **RECOMMENDED ORDER**


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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00, if the final decision is issued before October 1, 2010, or \$10,110.00, if the final decision is issued on or after October 1, 2010; 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 this decision.

September 29, 2010  
Date Decision Mailed



Michael D. Carlis  
Administrative Law Judge

MDC/ch  
# 116815

IN THE MATTER OF THE CLAIM OF \* BEFORE MICHAEL D. CARLIS,  
WENDALL J. WILSON \* AN ADMINISTRATIVE LAW JUDGE  
AGAINST THE MARYLAND HOME \* OF THE MARYLAND OFFICE  
IMPROVEMENT GUARANTY FUND \* OF ADMINISTRATIVE HEARINGS  
FOR THE ALLEGED MISCONDUCT OF \*  
THOMAS M. KERN, T/A \* OAH No.: DLR-HIC-02-09-34622  
MTK ENTERPRISES, INC., \* COMPLAINT No.: 07 (75) 1670  
RESPONDENT

\* \* \* \* \*

**FILE EXHIBIT LIST**

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The following were admitted for the Fund:

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Fund #5: Home Improvement Claim Form; and

Fund #6: Letter to the Respondent, dated July 13, 2007.

PROPOSED ORDER

*WHEREFORE, this 25th day of October 2010, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.*

*Andrew Snyder*

*Andrew Snyder*  
*Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION