

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF DEBORAH K. ANDERSON	* ADMINISTRATIVE LAW JUDGE,
AGAINST THE MARYLAND HOME	* THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-09-43005
OMISSIONS OF CHARLES W.	* MHIC NO.: 07 (75) 2582
FLEMING, JR., T/A TCR HOME	*
IMPROVEMENTS & REMODELING,	*
INC.	*
* * * * *	* * * * *

**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
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**STATEMENT OF THE CASE**

On September 6, 2007, Deborah K. Anderson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$17,378.00 for losses allegedly suffered as a result of a home improvement contract with Charles W. Fleming, Jr., trading as TCR Home Improvements & Remodeling, Inc. (Respondent).

I held a hearing on September 1 and October 6, 2010, at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Hope Sachs, Esquire, Assistant Attorney General, Department of Labor, Licensing and Regulation

(Department), represented the Fund. Philip Christian Dorsey, Esquire, represented the Claimant, who was present. James Mayer, Esquire, represented the Respondent, who was present.

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03.01-.10; 09.08.02.01-.02; and 28.02.01.01-.27.

### **ISSUE**

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

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant offered the following exhibits, which I admitted into evidence except as noted:

- Clt. Ex. 1. Letter from the Claimant to the Department, August 28, 2007
- Clt. Ex. 2. Budget Estimate Proposal from the Respondent, October 9, 2006
- Clt. Ex. 3. Contract, October 18, 2006
- Clt. Ex. 4. Copy of check for \$6,000.00 to the Respondent, October 18, 2006
- Clt. Ex. 5. Copy of check for \$9,000.00 to the Respondent, December 19, 2006
- Clt. Ex. 6. Letter from the Respondent to the Claimant, January 2, 2007
- Clt. Ex. 7. Not offered
- Clt. Ex. 8. Not offered
- Clt. Ex. 9A-9U. Photographs of the Respondent's work under the contract

- Cl. Ex. 10. Withdrawn
- Cl. Ex. 11. Proposal from Russell Rubenstein, April 25, 2007
- Cl. Ex. 12. Photograph of damaged wall
- Cl. Ex. 13. Photograph of damaged wall
- Cl. Ex. 14. Photograph of damaged wall
- Cl. Ex. 15. Photograph of damaged wall
- Cl. Ex. 16. Report to the Department from F.J. Kaiss, Sr., March 14, 2008, including cost estimates, copies of photographs, and Mr. Kaiss's *Curriculum Vitae*

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

- Fund Ex. 1. Notice of Hearing, June 7, 2010
- Fund Ex. 2. Hearing Order, October 9, 2009
- Fund Ex. 3. The Respondent's licensing history with the MHIC
- Fund Ex. 4. Letter from the MHIC to the Respondent, October 25, 2007, with the Claimant's Home Improvement Claim Form attached

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

- Resp. Ex. 1. Receipt from Expo Design Center, November 28, 2006
- Resp. Ex. 2. Receipt from Value City Furniture, December 2, 2006
- Resp. Ex. 3. Receipt from Tops Unlimited, LLC, February 1, 2007
- Resp. Ex. 4. Timeline prepared by the Respondent<sup>1</sup>
- Resp. Ex. 5. Photograph of framing in the shower
- Resp. Ex. 6. Letter from the Respondent to the Claimant, April 5, 2007
- Resp. Ex. 7. Letter from the Respondent to the Claimant, April 19, 2007

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<sup>1</sup> This exhibit has been retained at the Office of Administrative Hearings because it is too large to fit in the file to be returned to the Department. If exceptions are filed, or if for some other reason the Department requests the exhibit, the Office of Administrative Hearings will provide it to the Department.

Resp. Ex. 8. Letter from David W. Shineman, Esquire, to the Respondent, May 8, 2007

Resp. Ex. 9. Drawings of areas of work to be done and lists of supplies needed

Resp. Ex. 10. Schematic drawing of bathroom

Resp. Ex. 11. Smaller drawing labeled "Anderson Bathroom Renovation"

Resp. Ex. 12. Chart labeled "Anderson Work Hours"

Resp. Ex. 13. Handwritten notes, March 26, 2007; typed punch list

Resp. Ex. 14. Change Order, unsigned, March 21, 2007

Resp. Ex. 15. Invoice, April 13, 2007

#### Testimony

The Claimant testified and presented Russell Rubenstein as a witness.

The Respondent testified and presented Richard Liggett as a witness.

The Fund presented no testimony.

#### **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 01-50226.
2. On October 18, 2006, the Claimant and the Respondent entered into a contract to remodel the Claimant's master bathroom, remodel the Claimant's office on the lower level of the house, replace some boards on the Claimant's deck, and do some minor trim work in the Claimant's kitchen. The contract stated that work would begin within three weeks and would be completed within approximately seventy-five working days.
3. The original contract price was \$30,168.00.

4. The contract was orally modified at some point shortly after the work began to include furnishing and installing a heat lamp in the bathroom. The cost of this change was never established.
5. The contract included allowances for the bathroom fixtures and accessories (toilet, vanity, countertop, sink, faucets, mirrors, lights, medicine cabinets, etc.), the shower door, and ceramic tile. This meant that, under the terms of the contract, the Respondent would furnish and install these items, but the Claimant would be responsible for any amounts spent to purchase them that exceeded the allowances.
6. The Respondent did not purchase a vanity, countertop, lights, mirrors, shower door, medicine cabinets, sink, or faucets. The Respondent did purchase a toilet, toilet seat, ceramic tile, and diverter for the shower.
7. On November 28, 2006, the Claimant purchased lights for the bathroom.
8. On December 2, 2006, the Claimant bought a vanity. At the Respondent's direction, this item was delivered on January 15, 2007.
9. By December 19, 2006, the Claimant had chosen all the tile for the bathroom.
10. On February 1, 2007, the Claimant purchased a countertop, which was installed by the seller on or about March 5, 2007.
11. The Respondent began work under the contract on December 11, 2006. Don Lawry was the foreman on the job, Lonnie Robeson was the helper, and Joe Sennett did the tile work.<sup>2</sup>

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<sup>2</sup> These names may be spelled incorrectly, as they are not written down anywhere in the evidence. The names are taken from Richard Liggett's testimony. The Claimant referred to the foreman as "Don Flemming."

12. The work in the bathroom required the services of plumbing and electrical subcontractors. The work on the lower level also needed an electrical subcontractor.

13. The Respondent continued to work on the bathroom through December, but took a week off between Christmas and January 5, 2007. The Claimant was unhappy with the rate of progress, but the work was proceeding at a pace contemplated by the contract.

14. In early January 2007, the Respondent complained to the Claimant that she still had junk stored in the lower level area that was to be remodeled into an office. The Respondent asked that the area be cleared so that aspect of the work could begin.

15. Because she was displeased with the pace of the work on the bathroom, the Claimant told the Respondent that she would not allow work to be done in any other area of the house until the bathroom was finished.

16. The Claimant was anxious that the bathroom be finished by February 2, 2007, when she was scheduled to go out of town for about ten days on a business trip. Richard Liggett, the Respondent's project manager, assured her that the bathroom would be completed by that date.

17. The Respondent continued to work on the bathroom through January, although still not at a pace that satisfied the Claimant. When she left town on February 2<sup>nd</sup>, the project was far from complete, although this was partially caused by the absence of the countertop.

18. The Claimant returned on February 13<sup>th</sup> and informed the Respondent that he could resume work. The Respondent did so, and continued to work on the bathroom through March 6, 2007.

19. Caplan Glass delivered and installed the shower door on February 26, 2007. The Claimant later paid \$3,189.00 for this item, approximately the same as the allowance in the contract.

20. On March 7, 2007, the Respondent and the Claimant considered the bathroom substantially complete. All the furnishings had been installed, the shower was tiled, and the floor, vanity, countertop, toilet, and sink were finished.

21. The Respondent's work was not up to industry standards in several respects. The most glaring shortcoming was in the tile work in the shower, and in particular the grout, which had been applied incompetently. The grout was uneven, cracked, and missing in several areas. Grout and grout residue covered the tile in some places and were on the base of the toilet. The shower was not usable because the cracks and gaps in the grout would allow water to leak out.

22. The Respondent's workers used ugly brown caulk that did not match or complement the tile and grout in and around the shower. They also used caulk to try to cover some of the cracks in the grout.

23. The shower control panel was not firmly attached to the wall or sealed.

24. On March 26, 2007, the Respondent and Mr. Liggett did a walk-through of the bathroom with the Claimant. The Claimant pointed out her concerns, and the Respondent wrote them down and later produced a typed "punch list" of work that needed to be corrected.

25. At that point, the Claimant had paid the Respondent \$15,000.00 under the contract.

26. Around this same time, the Respondent prepared a Change Order to the contract reflecting \$1,236.00 for extra electrical work, \$75.00 for insulation, \$211.00 additional charge above the allowance for tile, a credit of \$5,626.00 for the unused allowances for the shower door and bathroom fixtures, and a credit of \$7,855.00 for the work that still remained to be done in the kitchen and lower level, on the correct supposition that the Claimant did not want the Respondent to perform that work. According to the Respondent's calculations, this Change Order had the effect of reducing the contract price to \$18,209.00 and the amount owed by the Claimant to \$3,209.00.

27. The Claimant did not agree to or sign the Change Order.

28. On March 28, 2007, an employee of the Respondent came to the Claimant's home, supposedly to do punch list work, but said he could not fix the problems with the grout and did no work.

29. The Claimant never paid the \$3,209.00, and the Respondent did no more work under the contract.

30. On April 5, 2007, the Respondent sent the Claimant a letter essentially agreeing to do the punch list work if the Claimant paid the outstanding balance.

31. On or about April 13, 2007, the Claimant left a voice mail message for the Respondent instructing him not to return to her home.

32. On May 8, 2007, the Claimant's attorney, David W. Shineman, II, Esquire, informed the Respondent in writing that the contract was terminated.

33. In late March or early April 2007, the toilet that the Respondent had installed in the master bathroom started leaking through the floor into the room below. The cause of the leak was a crack in the plastic seal under the toilet.



34. The Claimant hired Russell Rubenstein to replace the toilet, do the punch list work, and perform some painting that was not in the contract with the Respondent. The Claimant paid Mr. Rubenstein \$3,175.00 for this work.

35. The Claimant could have re-used the toilet that the Respondent had installed in the bathroom, but she instructed Mr. Rubenstein to install a new one.

36. The value of the painting that Mr. Rubenstein did was \$225.00.

37. Mr. Rubenstein has never been licensed by the MHIC as a home improvement contractor.

### **DISCUSSION**

A homeowner 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) (2010). *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.” Md. Code Ann., Bus. Reg. § 8-401 (2010). In this case, although some of the Respondent’s work was inadequate, the Claimant has not shown that she is eligible for compensation from the Fund.

There is no doubt that the Respondent left the work inadequately finished when the bathroom was declared completed on March 7, 2007. The Claimant’s photographs (Cl. Ex. 9) establish that the grout in and around the shower was in horrible condition when the Respondent’s workers left. The shower was altogether unusable because the gaps and cracks in the grout would have allowed water to leak out of the shower.

The other major problem was the cracked plastic seal under the toilet, which was discovered when the toilet started leaking in late March or early April 2007. This and the grout had to be addressed before the Claimant would have a bathroom that she could use.

Despite the seriousness of these problems, the Respondent and Mr. Liggett testified that the punch list work could have been done by one worker in half a day. They both characterized the problems as minor and easily remedied.

I do not find this testimony particularly credible, since one of the Respondent's workers returned to the home on March 28<sup>th</sup> but did no work, saying he could not repair the grout because the tile installer had moved to Myrtle Beach, and he (the worker) did not know what kind of grout had been used. The Respondent himself stated that he keeps records of materials used on jobs in the office, and the type of grout could have been easily ascertained. If this is the case, the worker should have been able to repair the grout, yet did not do so. This, combined with the fact that the Respondent did not address the issue with the toilet in his testimony, convinces me that the inadequacy of the work was more serious than the Respondent acknowledged.

Both the Respondent and the Fund argue that the Claimant is barred from recovery from the Fund because she rejected the Respondent's offers to return and repair the items on the punch list. Section 8-405(d) of the Business Regulation Article states as follows: "The Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim."

The evidence shows that by the end of March 2007, the Claimant and the Respondent were at a stand-off. Quite clearly, the Respondent was not going to perform the punch list work without being paid the \$3,209.00 he calculated was due and owing under the contract. In his letter of April 5, 2007 (Resp. Ex. 6), the Respondent wrote the following: "As of this writing, the

only item for which we are responsible is to repair the grout in several places. This will be scheduled at a mutually agreeable time. However, as your contract has achieved substantial completion, the balance outstanding is now due and payable." This language, together with the testimony of the Claimant and Respondent, convinces me that the Respondent would make no repairs until he received payment. Thus, this was not a situation in which the Claimant prevented the Respondent from returning to make repairs; the Respondent never offered to make those repairs without being paid. Therefore, I find no violation of section 8-405(d) of the Business Regulation Article by the Claimant.

The MHIC's regulations offer three formulas for measurement of a claimant's actual loss, as follows:

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

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(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 measurement accordingly.

COMAR 09.08.03.03B(3).

The Claimant here did hire another contractor, Mr. Rubenstein, to repair and complete the Respondent's faulty work. She paid Mr. Rubenstein \$3,175.00 for his efforts, but there are two obstacles to this amount's being used in the formula of COMAR 09.08.03.03B(3)(c).

First, Mr. Rubenstein has never been licensed by the MHIC, despite over thirty years of performing home improvements. Ms. Sachs, representing the Fund, stated that the policy of the MHIC is not to allow reimbursement for work performed by an unlicensed contractor. Section 10-214(b) of the State Government Article, Annotated Code of Maryland, states: "In a contested case, the Office [of Administrative Hearings] is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case."

Awards from the Fund are governed by Title 8, Subtitle 4 of the Business Regulation Article, Annotated Code of Maryland. Subtitle 4 contains no prohibition against awards to claimants who have remedial work performed by unlicensed contractors. Section 8-405(e) lists expenses that may not be reimbursed by the Fund, but payments to unlicensed contractors are not mentioned. Similarly, no COMAR regulation bars such payments.

The Fund did not offer any evidence of the MHIC's policy on this issue. An agency's settled, pre-existing policy is often (although not always) reduced to writing, and it would be helpful for an Administrative Law Judge to have a copy of such a policy if it exists in written form. I am left in the position of not knowing whether the MHIC's policy is something that is applied across the board in the MHIC's proceedings involving the Fund, or whether it is merely an argument to be presented in administrative hearings.

Two other aspects of this policy are troubling. First, the policy appears to place a restriction on awards from the Fund that the Legislature did not enact or intend. As mentioned

above, section 8-405(e) lists awards that are prohibited, as follows:

- (e) The Commission may not award from the Fund:
- (1) more than \$20,000 to one claimant for acts or omissions of one contractor;
  - (2) more than \$100,000 to all claimants for acts or omissions of one contractor unless, after the Commission has paid out \$100,000 on account of acts or omissions of the contractor, the contractor reimburses \$100,000 to the Fund;
  - (3) an amount for attorney fees, consequential damages, court costs, interest, personal injury damages, or punitive damages;
  - (4) an amount as a result of a default judgment in court; or
  - (5) an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.

Md. Code Ann., Bus. Reg. § 8-405 (Supp. 2010). It is reasonable to assume that the Legislature intended this list to be complete.

Second, a claimant could hire a contractor who holds himself out as having a license, when in fact he does not. Homeowners are typically not sophisticated in determining a contractor's licensure status, and may have remedial work performed by an unlicensed contractor in good faith, under a reasonable belief that the contractor is licensed. Under the MHIC's policy, such a claimant would be unable to recover.

For these reasons, I am unwilling to conclude that the Claimant is barred as a matter of law from having her payment to Mr. Rubenstein for remedial work considered as evidence. However, as noted previously, there is another problem with plugging this payment into the calculations.

The Claimant paid Mr. Rubenstein \$3,175.00 for the work he did at her home, but not all of this sum was for repairing the Respondent's poor work. Mr. Rubenstein painted the bathroom, which was not included in the Respondent's contract. Mr. Rubenstein testified that the value of

the painting was \$225.00, so that amount must be subtracted from the \$3,175.00, leaving \$2,950.00 as the amount the Claimant paid to repair the Respondent's poor work.

The final issue to be resolved before applying the formula of COMAR 09.08.03.03B(3) is the actual contract price. The original price was \$30,168.00. After the Respondent failed to purchase the shower door and bathroom fixtures as required by the contract, and it became obvious that the Claimant did not want the Respondent to complete the work in other areas of the home, the Respondent re-calculated the contract price as \$18,209.00 (see Finding of Fact 26). Other than to state that she could not believe she still owed the Respondent \$3,209.00 after all she had been through, the Claimant did not offer any evidence disputing the new contract price or proposing an alternative. The Respondent seems to have calculated the revised figure in a reasonable manner, adding sums for extra work performed and tile bought above the contract allowance, and subtracting the unused allowances and the work not performed. Based on this evidence, I find that the contract price was \$18,209.00.

Since the Claimant hired Mr. Rubenstein to complete the contract and repair the Respondent's inadequate work, the correct measure of an award from the Fund is provided by COMAR 09.08.03.03B(3)(c), set forth above. The calculations are as follows:

\$15,000.00	paid under the contract
<u>+2,950.00</u>	to complete the contract
\$17,950.00	
<u>-18,209.00</u>	contract price
-\$259.00	actual loss.

Since the Claimant's actual loss is less than zero, she is not entitled to an award from the Fund. In other words, the Claimant received labor and materials from the Respondent of a value greater than the amount she paid for the Respondent's work.

**CONCLUSION OF LAW**

I conclude that the Claimant has not sustained an actual loss 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 not award the Claimant reimbursement; and

**ORDER** that the records and publications of the Maryland Home Improvement Commission reflect the Department's final decision.

December 10, 2010  
Date Decision mailed



Richard O'Connor  
Administrative Law Judge

# 118478

PROPOSED ORDER

*WHEREFORE, this 10th day of February 2011, 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**