

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
CLAY C. KINNA	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMINISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	
HOME IMPROVEMENT WORK	*	
UNDERTAKEN BY	*	OAH NO.: DLR-HIC-02-10-37914
JAMES ANDREW, T/A	*	MHIC NO.: 08 (75) 479
JAMES ANDREW CONSTRUCTION, INC.	*	

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

This case arose because of a complaint filed by Clay C. Kinna (Claimant) with the Maryland Home Improvement Commission (MHIC) against James Andrew, t/a James Andrew Construction, Inc. (Respondent). The complaint asserts that the Claimant entered into a home improvement contract with the Respondent for the construction of an addition at his residence. The complaint alleges that the Respondent's performance of the work was unworkmanlike and incomplete.

On April 7, 2009, the Claimant filed a claim with the MHIC seeking to recover \$34,912.00 from the Home Improvement Guaranty Fund (Fund). On October 6, 2010, the MHIC issued an order for a hearing on the claim against the Fund.

On May 6, 2011, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The hearing was conducted at the offices of the Frederick County Department of Social Services located in Frederick, Maryland. The Claimant appeared and represented himself. The Respondent appeared and represented himself. Peter Martin, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the 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 the Office of Administrative Hearings govern the 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, COMAR 09.08.02.01; COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland and, if so, the amount of the award.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following items were admitted into the record:

Fund Exhibit #1 – Copy of a November 12, 2010 Notice of Hearing and an Order for Hearing, with attached receipts for certified mail (ten pages)

Fund Exhibit #2 – Copy of a February 22, 2011 Notice of Hearing and an Order for Hearing, with attached receipts for certified mail (five pages)

Fund Exhibit #3 – Copy of a March 2, 2011 Notice of Hearing (two pages)

Fund Exhibit #4 – A letter from Steven Smitson, Executive Director, MHIC, dated April 12, 2011, certified as a true test copy of records

Fund Exhibit #5 – Copy of a MHIC letter addressed to the Respondent, dated April 23, 2009, with a copy of a Home Improvement Claim Form, dated April 7, 2009 (two pages)

Fund Exhibit #6 – Copy of a Stipulation of Dismissal in Case No. 10-C-08-126 CN in the Circuit Court for Frederick County, Maryland,

Claimant Exhibit #2 – Forty photographs with letter designations A through OO on the reverse of the photographs (a further description of the photographs is attached as an appendix to this decision)

No other exhibits were offered into the record.¹

B. Testimony

The Claimant testified in his own behalf. Kevin E. Bollinger, Jr., testified on behalf of the Claimant. Mr. Bollinger was admitted as an expert witness in home improvement. The Respondent testified in his own behalf. The Fund recalled the Claimant to testify as its witness. No other witnesses were called to testify.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license numbers 01-83839 and 05-124333 (corporation).

¹ Claimant's Exhibit #1 was marked as an exhibit, but a copy of that document was not submitted and actually admitted into the record of the hearing.

2. On or about September 25, 2006, the Claimant entered into a home improvement contract with the Respondent to build a custom two-story addition (twenty feet by forty feet) off of the existing house at 12815 Layman Road, Thurmont, Maryland (the property). The Respondent drafted a written proposal memorializing the scope of work to be performed at the property. The proposal was never signed.² The Respondent and the Claimant made a verbal agreement for the addition to be constructed and understood that the written proposal governed the scope of work to be performed at the property.

3. The original verbal agreement was that the Claimant would pay \$131,232.00 to the Respondent for his work. Under the draw schedule to the contract, the Claimant agreed to pay for the home improvement work in four equal installments of \$32,808.00.

4. The Respondent began work sometime during December 2006.³ Initially, progress in the construction of the addition was satisfactory to both parties.

5. The Respondent and the Claimant entered into numerous change orders to the contract. These change orders were verbal agreements to the scope of the work. No price was specifically assigned to each of the change orders. The Respondent and the Claimant simply had an understanding that the Respondent would bill the Claimant for time, labor and materials as required to perform the additional work. One of the changes in the scope of the work from what had been originally contracted was that the Respondent agreed to build a full basement and walkout (basement stairway) under the kitchen to the addition.

² This proposal was mentioned at several points in the testimony, but a copy was not offered for admission into the record.

³ This date was taken from the information listed on the claim form filed with the MHIC by the Claimant.

6. The Respondent was paid a total of \$130,486.00 for his work on the addition. These payments were in the form of checks given to the Respondent by the Claimant. The Respondent negotiated and cashed the following checks:

<u>Check No.</u>	<u>Amount</u>
124	\$33,000.00
132	\$32,616.00
Unidentified	\$38,408.00
134	\$11,462.00
135	\$15,000.00

7. As part of their verbal agreement, the Claimant was responsible for performing all of the electrical work that would be needed at the addition. While the Respondent was on vacation, two of his workers appeared at the job site prepared to do work in the kitchen of the addition. In order to continue with the work, the electrical installation work in the kitchen had to be completed; however, the Claimant had not performed the required electrical work. The Respondent's workers went to work on other job sites until the electrical work in the kitchen was completed. This impasse continued over several days with the Respondent's workers regularly showing up at the job site but unable to perform any work as the electrical work in the kitchen had not been done.

8. Before the Respondent had gone on vacation, he presented the Claimant with an invoice for the change orders in the amount of approximately \$20,000.00.⁴ While the Respondent was on vacation, the Claimant contacted one of his lead workers about the invoice for the change orders and said to him that he did not think that he should have to pay any more money for the work.

9. When the Respondent came back from vacation, he contacted the Claimant. The Claimant told the Respondent that he had found someone else to work on the addition and that

⁴ This invoice was mentioned numerous times in the testimony, but a copy was not offered for admission into the record.

the Respondent was fired. The Respondent was told to leave the property and not to return. Because of the Claimant's refusal to allow access, the Respondent had to arrange for a relative, a former police officer, to assist him in the recovery of his tools that were still at the property.

10. The Respondent ceased working on the addition during July 2007.⁵ When the Respondent ceased working on the addition, numerous items were left incomplete including, but not limited to: installation of tile in the laundry room, installation of drywall in the dining room and family room, grout work, work on the kitchen cabinets, installation of basement windows, installation of the basement door, installation of insulation in the basement ceiling, completion of drain tile for the foundation, installation of windows, pouring of cement stairs for the basement walkout, and drywall, paint, and installation of insulation in the kitchen.

11. When the Respondent stopped working, the following items of his work at the property were unworkmanlike or inadequate:

- a. drywall instead of greenboard had been installed in the master bathroom
- b. installation of the porch rail on the addition showed poor workmanship
- c. soffit in the porch of the addition had been installed incorrectly and was sagging
- d. a header in the basement had been installed with non-treated lumber

12. The fair market value of the cost to correct the above listed items of unworkmanlike or inadequate performance is \$1,820.00.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or

⁵ This date was taken from the information listed on the claim form filed with the MHIC by the Claimant.

unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2010).⁶ Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their “actual losses” from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2010). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2010). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629, 691 A.2d 699, 706 (1997). “The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor.” COMAR 09.08.03.03B(2). “At a hearing on a claim, the claimant has the burden of proof.” Md. Code Ann., Bus. Reg. § 8-407(e)(1).

⁶ Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

The Claimant was not well-organized in the presentation of his evidence and, as a result, his proof on the merit of his claim was hard to follow and confusing. The Claimant's proof was further handicapped by the omission of several key documents. The written proposal drafted by the Respondent regarding the construction of the addition was not offered into the record of the hearing. Copies of checks given by the Claimant to the Respondent for the work were not offered into the record. The Respondent's prepared invoice for change orders was not offered into the record. Kevin E. Bollinger, Jr., the Claimant's expert witness, had prepared a proposal to complete or correct the Respondent's work on the addition. Although Mr. Bollinger's proposal was marked as an exhibit (Claimant's Exhibit #1) and discussed at length in the testimony, a copy of that document was not submitted and actually admitted into the record of the hearing.

In his testimony, the Claimant indicated that he was justified in firing the Respondent. He stated that the Respondent's workers stopped showing up at the property and the Respondent demanded more money for his work than had been agreed. The Claimant's testimony on these points is at odds with the Respondent's testimony as to how their relationship ended. After a thorough review, the ALJ can find no reason to discount either the Claimant's or the Respondent's testimony and the probative value of the conflicting evidence, therefore, rests in equipoise. The Claimant has failed to persuade the ALJ that the disputed facts are as he claims them to be. Accordingly, the ALJ will resolve the disputed facts on why the work at the property stopped in favor of the Respondent. (Findings of Fact #7, #8 & #9) The Claimant has failed to demonstrate that his firing of the Respondent from the job site was justified.

This case appears to illustrate the inherent risks when a home improvement contract and change orders to that contract are not negotiated thoroughly and reduced to writing at the time made. Work on the addition at the property was undertaken without a signed, written contract memorializing the scope of work to be performed. Initially, progress in the construction of the

addition was satisfactory to both parties. There were numerous change orders to the scope of the work. However, these change orders were verbal agreements and no price was specifically assigned to each of the change orders. The Respondent and the Claimant simply had an understanding that the Respondent would bill the Claimant for time, labor and materials as required to perform the additional work. Before the Respondent had gone on vacation, he presented the Claimant with an invoice for the change orders in the amount of approximately \$20,000.00. The record suggests that the relationship between the parties rapidly deteriorated after that point. While the Respondent was on vacation, his workers could not continue with their work because the Claimant prevented progress by neglecting to perform electrical work he was responsible for. The Respondent's workers showed up at the job site but were unable to perform any work as the electrical work in the kitchen had not been done. While the Respondent was on vacation, the Claimant contacted one of the Respondent's lead workers about the invoice for the change orders and said that he did not think that he should have to pay any more money for the work. When the Respondent came back from vacation, he contacted the Claimant. The Claimant told the Respondent that he had found someone else to work on the addition and that he was fired. The Respondent was told to leave the property and not to return.

The Claimant presented Kevin E. Bollinger, Jr., a licensed home improvement contractor, as an expert witness in home improvement. Mr. Bollinger walked through the property on October 29, 2008, and he testified regarding the unfinished condition of the addition as he found it. However, Mr. Bollinger admitted during cross-examination that if a home improvement contractor is fired from the job and told to leave the job site, the work cannot be finished by the contractor.

The representative for the Fund and the Respondent argue that the Claimant is not entitled to include as measures of an "actual loss" the cost to complete items that were left

unfinished because the Claimant unjustifiably fired the contractor and ordered him from the property. The record does not demonstrate that the addition was left incomplete as a result of the Respondent's "misconduct." COMAR 09.08.03.03B(2). Accordingly, the ALJ agrees that the items of unfinished work in the addition at the property identified by Mr. Bollinger should not be treated -- for purposes of a claim against the Fund -- as an "incomplete" home improvement. Md. Code Ann., Bus. Reg. § 8-401.

Having determined that the Claimant terminated the contract by unjustifiably firing the Respondent, there is authority for the view that it would be inappropriate to consider whether some of the work performed by the contractor was deficient as he was never allowed to come back and address any concerns the Claimant may have had with his work.⁷ Assuming, without deciding, that it would be permissible to consider whether some of the work actually finished by the Respondent was unworkmanlike or inadequate, an award from the Fund would still not be warranted in this case. An explanation follows.

Of the numerous items in the addition that the Claimant points out, Mr. Bollinger did note some discrepancies, as he saw it, with the Respondent's work:

- a. drywall instead of greenboard had been installed in the master bathroom⁸
- b. installation of the porch rail on the addition showed poor workmanship
- c. soffit in the porch of the addition had been installed incorrectly and was sagging
- d. a header in the basement had been installed with non-treated lumber

⁷ "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." Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2010).

⁸ During Mr. Bollinger's October 29, 2008 inspection, he was unable to verify if drywall instead of greenboard had actually been installed in the bathroom. But, Mr. Bollinger indicated that the installation of drywall instead of greenboard was inadequate performance of the work. When he testified, the Respondent acknowledged that he had installed drywall instead of greenboard in the bathroom.

When he had prepared his written proposal for completion or correction of the Respondent's work, Mr. Bollinger had estimated the cost to correct the above listed items as follows:

- a. \$965.00 to remove the tile, drywall and replace with greenboard
- b. \$305.00 to fix the porch rail
- c. \$360.00 to correct the soffit
- d. \$190.00 to replace the header board

A preponderance of evidence in this record would establish that the Respondent's performance of the work with respect to these items that were finished was unworkmanlike or inadequate. The fair market value of the cost to correct these four items of unworkmanlike or inadequate performance would be \$1,820.00.

In addition to the above four items, Mr. Bollinger was critical of the Respondent's construction of the roof of the addition. Specifically, Mr. Bollinger pointed out the installation of the new rafters of the addition to the existing ridge beam at the property as one of his concerns. Mr. Bollinger also pointed out that the Respondent had used 1" X 4" rafters instead of 2" X 4" rafters as, reportedly, specified in the plan for the addition.⁹ Mr. Bollinger could not testify whether these items were inadequate from an engineering standpoint, but he questioned if the Respondent's performance of the work regarding the rafters was sound and workmanlike. However, no cost to correct, repair or replace these items was submitted into the record. As insufficient evidence was provided, the fair market value of the cost to repair, correct and/or replace the new rafters in the addition could not be included in any calculation of the Claimant's actual loss.

⁹ The Claimant had supplied the Respondent with an architectural plan for the addition's construction. The source of that plan was not mentioned in the record and the plan itself, was not offered into the record of the hearing.

COMAR 09.08.03.03B(3) sets forth the various formulas for determining an “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 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)(a) could not apply to the facts as found. The Claimant did not present any evidence of “the value of any materials or services provided by the” Respondent at the property, so his claim cannot be measured under COMAR 09.08.03.03B(3)(b). As the first two possibilities are foreclosed, the ALJ could only evaluate the instant claim of an “actual loss” in accordance with COMAR 09.08.03.03B(3)(c).

Application of COMAR 09.08.03.03B(3)(c) to the instant claim is problematical. One of the steps required is to calculate the “original contract price.” Within the meaning of this regulation, the original contract price should be the sum of an initial contract price and the price of any change orders. There were changes to the scope of the work to be performed by the Respondent; however, the change orders were verbal agreements and no price was specifically assigned to each of the change orders. The Respondent and the Claimant simply had an

understanding that the Respondent would bill the Claimant for time, labor and materials as required to perform the additional work. The parties do not agree on the price for the change orders in this case. In his testimony, the Claimant mentioned the Respondent billed him \$20,000.00 for the change orders. The claim form against the Fund reads that the amount of the change orders was \$18,660.00. The Respondent's invoice for the change orders was not submitted into the record and, therefore, that writing cannot be used to confirm either amount. In determining the "original contract price," the ALJ will use the lower figure of \$18,660.00 as the proper cost of the change orders.

In order to determine the Claimant's actual loss under COMAR 09.08.03.03B(3)(c) from the evidence in this record, the following calculations would be performed:

\$130,486.00	Payments made to the Respondent
+ \$ <u>1,820.00</u>	Cost to repair or replace the work (four items as discussed above)
\$132,306.00	(Expenditure Subtotal)
- <u>\$149,892.00</u>	Original Contract Price (\$131,232.00 + \$18,660.00)
\$.00	Actual Loss

Even if the items of unfinished work in the addition as identified by Mr. Bollinger were to be included as measures of the Claimant's actual loss, it would be difficult to determine the proper cost to complete these items. In his statements, the Claimant indicated that he personally had completed significant items of work (installation of drywall in the dining room and family room) left unfinished by the Respondent. Apparently, Mr. Bollinger, as Mountainside Builders Home Improvement, merely prepared an estimate of the work the Claimant wanted done on October 29, 2008.¹⁰ The record does not reflect that Mountainside Builders Home Improvement performed work at the property after Mr. Bollinger's October 29, 2008 inspection. It is unclear if

¹⁰ Mr. Bollinger is the MHIC license holder for Mountainside Builders Home Improvements.

all of the items of work left unfinished by the Respondent have been completed or not. If all of the unfinished items have not been completed, it is unclear if the Claimant intends to engage Mountainside Builders Home Improvement to perform the work. The calculation of an "actual loss" is not based on what could have been paid to a more expensive contractor if a claimant hires a less expensive contractor to do the work or performs the work himself. The Claimant's proof of loss with respect to the unfinished items would still fail for a lack of evidence.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has failed to prove that the Respondent's "acts or omissions" resulted in an "actual loss." Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3).


RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Maryland Home Improvement Commission:

ORDER that the Claimant be DENIED an award from the Fund; and further,

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

June 2, 2011
Date Decision Mailed
SJN:sn
#122719vt



Stephen J. Nichols
Administrative Law Judge

APPENDIX

Claimant Exhibit #2 consisted of forty photographs marked A through OO on the reverse

of the photograph:

1. Original Photo (2A)
2. Original Photo (2B)
3. Original Photo, (2C)
4. Door not installed (2D)
5. (no description)(2E)
6. Drywall repair (2F)
7. (no description)(2G)
8. Trim not fasted (2H)
9. Doors not installed (2 I)
10. (no description)(2J)
11. (no description)(2K)
12. No insulation in floor (2L)
13. (no description) (2M)
14. (no description) (2N)
15. (no description)(2O)
16. Insulation in wall (2P)
17. (no description) (2Q)
18. Concrete stairs not poured (2R)
19. (no description) (2S)
20. Caulking of basement door (2T)
21. (no description) (2U)
22. (no description) (2V)
23. (no description) (2W)
24. (no description) (2X)
25. Different sizes of window sills ((2Y)
26. (no description) (2AA)
27. (no description) (2BB)
28. (no description) (2CC)
29. (no description) (2DD)
30. Missing grout (2EE)
31. Crooked tile work (2FF)
32. (no description) (2GG)
33. Drywall repair (2HH)
34. Missing plugs (2II)
35. Caulking (2JJ)
36. Unfinished wood (2KK)
37. Trim unfinished (2LL)
38. Filler strip loose (2MM)
39. Filler strip loose (2NN)
40. Toe kick loose (2OO)

PROPOSED ORDER

WHEREFORE, this 5th day of August 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.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION