The Maryland Home Improvement Commission	*	BEFORE THE
	*	MARYLAND HOME IMPROVEMENT
	*	COMMISSION
	*	
v. Alireza J. Smiley	*	MHIC No.: 11 (90) 269
t/a Home Improvement Center, Inc. (Contractor)	*	
and the Claim of Michael A. Brasch (Claimant)	*	

****

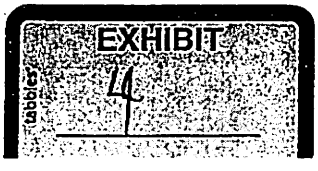
FINAL ORDER

WHEREFORE, this July 19, 2013, Panel B of the Maryland Home Improvement Commission ORDERS that:

1. The Findings of Fact set forth in the Proposed Order dated (July 19, 2013 are AFFIRMED.
2. The Conclusions of Law set forth in the Proposed Order dated July 19, 2013 are AFFIRMED.
3. The Proposed Order dated March 7, 2014 is AFFIRMED.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION



IN THE MATTER OF THE CLAIM	*	BEFORE MARINA LOLLEY SABETT,
OF MICHAEL BRASCH,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	OAH NO.: DLR-HIC-02-12-27615
FOR THE ALLEGED ACTS OR	*	MHIC NO.: 11 (90) 269
OMISSIONS OF ALIREZA J. SMILEY,	*	
t/a HOME IMPROVEMENT CENTER,	*	
INC.,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On or about March 9, 2011, Michael Brasch (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $20,778.00 for actual losses allegedly suffered as a result of a home improvement contract with Alireza Smiley t/a Home Improvement Center, Inc. (Respondent). The matter was transmitted to the Office of Administrative Hearings (OAH) on June 28, 2012, to set the matter for hearing.

I held a hearing on March 28, 2013, at the Wheaton Park Office Complex, in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant represented himself and the Respondent represented himself.

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. 2012), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.

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

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

Cl. Ex. 1 – Pictures 1-11

Cl. Ex. 2 – Various diagrams related to the kitchen renovation and accompanying documentation (1-8)

Cl. Ex. 3 – Contractor Bids for Floor Repair (1-2)

Cl. Ex. 4 – MHIC Claim (1-8)

Cl. Ex. 5 – Proposal of Work from Inspiration Renovations

Cl. Ex. 6 – Checks paid to Inspiration Renovations, dated March 20 – June 2, 2011

Cl. Ex. 7 – Direct Buy Invoice, dated March 2011

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

GF Ex. 1 – OAH Notice of Hearing, dated December 27, 2012

GF Ex. 2 – Letter from Steven Smitson, Executive Director, MHIC, dated January 18, 2013

GF Ex. 3 – Letter and Claimant's MHIC Claim from John Borz, Chairman, MHIC, to the Respondent, dated March 17, 2011

The Respondent presented no exhibits for admission in this case.

Testimony

The Claimant and his wife, Ruth Brasch, testified on behalf of the Claimant.

The Respondent testified on his own behalf.

No other testimony was presented.

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 01-40259 and 05-128452.

2. On or about January 31, 2009, the Claimant and the Respondent entered into a Contract for various tasks related to the remodel of the Claimant's kitchen. CL. Ex. 4-4.

3. Specifically, the Contract included the tear out of the following existing elements: countertops; cabinets; appliances; plumbing; electric; and ceramic flooring and subflooring (including the mudroom), as necessary. Cl. Ex. 4-4, at p.6. The Contract also included installation of: electrical wiring; floor vent; HardieBacker Cement subflooring on entire kitchen floor, mud room, and pantry closet; large travertine marble tiles; round shoe molding; drywall to be ready for primer, cabinets, knobs and moldings; faucets and dishwasher plumbing; and a downdraft system with interior or exterior vents (exterior for an extra charge). Cl. Ex. 4-4, at pp. 6-7.

4. The Respondent referred to himself in the January 31, 2009 Contract as the "Supplier/General Contractor" and to the Claimant as "Client."

5. At some point prior to commencing the work under the Contract, the Claimant's wife took the Respondent to the basement so that the Respondent could see the underneath of the surface on which he would be working/building. There was no discussion of whether the existing supports and floor structure were adequate to support the weight load that would be created by the substantially larger island and marble tile.

6. The Respondent was referred to the Claimant by the designer of their kitchen renovation, Bella Creativa (kitchen designer), and the Respondent gave the Claimant a "Package Discount" of $349.00 for choosing both him and the kitchen designer for the project. Cl. Ex. 4-4, at p. 8.

7. The total cost to complete the work under the Contract was $15,500.00. Id. The Respondent completed the work under the Contract and was paid in full for his services.

8. The cost of the installation of the HardieBacker and travertine tile installation was $6,650.00, as itemized separately in the contract. Cl. Ex. 4-4, at p.7.

9. The marble floor tile was purchased separately by the Claimant for a cost of $4,338.10. Cl. Ex. 4-8.

10. The project was completed in April 2009. Within a few days of completion, cracks began to appear in the travertine tile. The Claimant discussed this issue with the Respondent and both agreed to let the floor settle until the cracking stopped. Over the course of the summer in 2009, the Respondent came to the Claimant's home to see the problem and brought a flooring person as well as someone who understood structural issues to see what could be done to fix the cracking tile issue. Numerous discussions

were had as to how to remedy the issue. Remedies discussed included installation of wood flooring, which would be less likely to crack as the floor settled.

11. As the weather got colder in the fall and winter of 2009, both the Claimant and the Respondent agreed to wait until the weather got warmer to remedy the cracking tile issue, as any repair would likely generate a great deal of dust requiring that the windows be left open. The Claimant and his wife called the Respondent on numerous occasions to set up a schedule to fix the floor; however, the Respondent did not return the calls.

12. After numerous attempts were made to contact the Respondent, the Claimant ultimately submitted a complaint to the HIC on or around August 24, 2010, regarding his issue with the Respondent.

13. The HardieBacker material under the tile had been improperly installed and the floor was not able to structurally support the weight of the marble and significantly larger island installed by the Respondent, both of which caused the tile to crack.

14. The Respondent did not properly install the HardieBacker under the tile according to the manufacturer's specifications. Cl. Ex. 2 – 4 and 5.

15. The Respondent installed the HardieBacker in direct conflict with the manufacturer's specifications that require the HardieBacker boards to be staggered and not aligned with subfloor joints, prohibit all four corners of the boards to meet at one point, recommend that an 1/8th inch gap be left between board edges, and state that joints of the HardieBacker board be taped prior to filing. Cl. Ex. 2- 4. Moreover, the HardieBacker is supposed to be embedded and attached to the subfloor in a bed of mortar or modified thinset, which was not done. Id. Also noted in the manufacturer's literature is the

requirement that the installer "[e]nsure that the subfloor is structurally sound," which did not properly occur prior to the Respondent's renovation in this case. Id.

16. The homeowners ultimately had all of the travertine tile and cement board that had been installed by the Respondent removed and in its place installed hardwood floor. None of the tile was salvageable. This work was all done by Inspiration Renovations, MHIC # 101899 (Inspiration). Cl. Ex. 5, at p. 2.

17. By removing the marble tile and the HardieBacker Cement subflooring, the overstress on the floor structure reduced from 36% to 27%; accordingly, various supports were still necessary to support the extra weight of the renovation, even with the removal of the tile. Cl. Ex. 2-2.

18. The cost of this work done by Inspiration was $8,838.40, and Inspiration was paid in full. Cl. Ex. 5, at p. 2; Cl. Ex. 6.

19. The cost of the hardwood flooring installed by Inspiration was $4,964.35, which was paid for separately by the Claimant. Cl. Ex. 7.

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. 2012). *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 the instant case, I find that the Claimant has proven that he sustained an actual loss as a result of the Respondent's unworkmanlike or inadequate completion of a portion of the work for which he was contracted. Accordingly, the Claimant is entitled to a recovery from the Fund in the amount of $6,650.00 for the reasons that follow.

The Claimant asserts that the floor tiles cracked soon after installation as a result of: (1) a lack of proper structural supports to withstand the load of a marble floor, significantly larger island and the granite counter top on that island; and (2) improper installation of the HardieBacker subflooring. The total cost of the Claimant's contract with the Respondent was $15,500.00, which included many other items besides the installation of the tile and sub-floor, the cost of which was itemized in the amount of $6,650.00. Cl. Ex. 4-4, at p. 7.

With regard to the structural issues, the Claimant asserts that the Respondent, as a general contractor, should have known that the supports were inadequate to hold such an additional load. Further, the Claimant contends that at the very least, the Respondent should have recommended a structural engineer at the outset to assess what was clearly a significantly greater load on the supports under the kitchen than what was placed on the structural supports by the existing island, countertop and flooring. In support of his contentions, the Claimant presented the reports of James Killorin of Inspiration Renovations and Dale Kramer, Sales Manager, d.g.Liu Contractor's Inc. (MHIC 49732), both of whom indicate that prior to the installation of the marble floor and/or the large kitchen island and heavy granite countertop, a structural engineer should have been consulted by the general contractor to assess whether the existing structure could accommodate the considerable extra weight. Cl. Ex 2-6 and 7.

When a structural engineer, John Buffett, PE of Structure by Design, PA, was hired to perform a structural assessment on or before September 30, 2010, it was revealed that additional supports were necessary to support the heavy island and marble flooring in this case. See Cl. Ex. 2-2. Specifically, Mr. Buffett found that the joists under the island failed by 36% overstress in bending. By removing the marble tile and the HardieBacker Cement subflooring, the overstress would reduce to 27%; accordingly, various supports would still be necessary to support the extra weight of the renovation, even with the removal of the tile. Id.

The Respondent does not dispute that it was ultimately determined that there were structural issues that needed to be addressed to support the kitchen renovation, and that such structural issues led to the cracking of the tile. The Respondent does dispute, however, that he was responsible for knowing whether the existing structural supports were adequate to accommodate the kitchen renovation in this case. In support of this position, the Respondent essentially testified that he doesn't build houses, he just renovates them. Therefore, the Respondent's contention is that he does not need to determine structural sufficiency and did not need to do so in the instant case. The Respondent's position is self-serving and absurd.

The Respondent is a forty-three year veteran of the home improvement business and was the "general contractor" for this job, as stated in the Contract. Cl. Ex. 4-4, at p.1. Even if the Respondent did not know whether the structures he saw supporting the floor in the basement would be adequate to support the great additional weight load he would be adding with his installation of the large island, granite countertops, and heavy marble floor, he should have suggested that the Claimant get a structural engineer to determine it. The Respondent did not contend that the designer was aware or even considered the issue of whether the existing house structure could accommodate the great additional weight of the proposed renovation. The Respondent clearly knew the designer and could have asked these questions.[1] Rather, the Respondent essentially said that it was not his job to ensure that his remodel would be supported by the existing structure. I find, however, that as the general contractor on this job, it was the Respondent's responsibility to ensure that the weight of the additional tile, island and countertop would not cause the entire kitchen to fall into the basement or create such a load on the floor that the floor tile would buckle and crack, as the tile did in the instant case. The Claimant and his

[1] Indeed, the Claimant got a "package discount" on the total cost of the contract in the amount of $349.00 because the Claimant used the Respondent as recommended by the kitchen designer.

wife are not experts in kitchen renovation, which is why they hired the Respondent. I am not suggesting that the Respondent needs to go out and get a degree in structural engineering. Rather, I find that the Respondent should have at least identified for the homeowner specific foreseeable issues that need to be addressed in a renovation, which he did with regard to the plumbing, electrical, and venting systems. Certainly, when the Respondent looked at the structure and supports of the floor in the basement and knew that he would be adding a great deal of extra weight, he should have suggested to the Claimant and his wife that a structural engineer verify the ability of the existing structure to carry the additional weight load. If the Respondent truly believes and has operated under the premise that he need not be concerned about the structural aspects of his renovations, which defies common sense, it is amazing that something like this (or worse) has not happened with respect to one of the Respondent's other projects.

With regard to the installation of the tile, the Claimant submitted literature from HardieBacker and a factual report by Mr. Kramer, both of which suggest that the HardieBacker was not properly installed according to the manufacturer's specifications. Cl. Ex. 2 – 4 and 5. Specifically, Mr. Kramer observed that the HardieBacker was not attached to the subfloor by a bed of mortar or modified thinset, and the joints of the HardieBacker were not staggered over joints in the plywood. Indeed, in some areas, the HardieBacker joints were aligned with subfloor joints and the four corners of such boards met at one point, and the joints between the HardieBacker boards were not taped. Cl. Ex. 2-5. All of the above identified installation techniques of the Respondent are in direct conflict with the manufacturer's specifications that require the HardieBacker boards to be staggered and not aligned with subfloor joints, prohibit all four corners of the boards to meet at one point, recommend that an 1/8th inch gap be left between board edges, and state that joints of the HardieBacker board be taped prior to filing. Cl. Ex. 2- 4.

The HardieBacker is supposed to be embedded and attached to the subfloor in a bed of mortar or modified thinset, which was not done. Id. Also noted in the manufacturer's literature is the requirement that the installer "[e]nsure that the subfloor is structurally sound," which did not properly occur prior to the Respondent's renovation in this case. Id.

In response to the observations about the HardieBacker not being installed per the manufacturer's specifications, the Respondent simply stated that in his many jobs he has never had an issue with a floor after installing the HardieBacker. He also testified at some other point in the proceeding, however, that HardieBacker was a relatively new product, which belied the importance of the Respondent's "experience" testimony. In any event, the Respondent did not dispute that he installed the HardieBacker boards in the manner identified by Mr. Kramer.

By failing to adequately assess or at the very least have a structural engineer assess the structural integrity of the subfloor to withstand the additional weight created by the renovation and/or his failure to install the HardieBacker in accord with the manufacturer's specifications, the Respondent is responsible for an unworkmanlike and/or inadequate home improvement with regard to the installation of the marble tile in this case. There is no dispute that the tile cracked due to structural inadequacies in support for the subfloor, creating a situation in which the overstress in bending caused the tile to crack. There is also no dispute that the Respondent failed to install the HardieBacker in accord with manufacturer's specifications. Accordingly, the Claimant suffered actual damages as a result of the unworkmanlike or inadequate tile installation performed by the Respondent and the Claimant is entitled to an award from the Fund in this case.

I now turn to the amount of the award for which the Claimant is eligible. Preliminarily, it should be noted that 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). If

should also be noted that such an award may not exceed the original amount of the contract at issue. Md. Code Ann., Bus. Reg. § 8-405(e)(5)(Supp.2012).

With the above-noted limitations in mind, MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The appropriate formula in this case is as follows:

> 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).

Applying that formula here, the cost of installing the tile was $6,650.00, as itemized separately in the Contract. Cl. Ex. 4-4, at p.7. Although the Claimant was requesting the full $15,500.00 as the Contract price at issue, the Claimant made it very clear at the hearing that the only issue he had with the Respondent's workmanship had to do with the cracked marble floor. The Claimant and his wife testified that they were very pleased with the cabinet installation and all other work that the Respondent performed at their home. The Respondent was equally effusive with regard enjoying doing work for the Claimant and his wife. It was very refreshing and a tribute to all parties that such civility and cordial relations were maintained at the hearing.

In order to correct the tile work done by the Respondent, the Claimant paid $8,838.40 to an MHIC registered contractor, Inspiration, to have all of the travertine tile and cement board that had been installed by the Respondent on the floor removed and hardwood floor installed in

its place. None of the tile was salvageable. Cl. Ex. 5, at p. 2. Added to the $8,838.40 is $4,964.35, the cost of the hardwood floor that the Claimant purchased directly from Direct Buy. Cl. Ex. 7. Accordingly, the total amount that the Claimant had to pay to correct the tile work done by the Respondent was $13,802.75. I decline to find the cost of the structural modifications made by the Claimant to his home to be actual damages as they are "consequential" and not appropriately added to the cost of the repair to the tile floor. COMAR 09.08.03.03B(1). Similarly, the cost of the tile that the Claimant paid for separately to have installed by the Respondent in the first instance are part of the consequential damages that are not appropriately awarded and payable by the Fund. *Id.*

When the $13,802.75 that the Claimant paid to repair the Respondent's work under the Contract is added to the $6,650.00 that he paid to the Respondent for the tile work, the total is $20,452.75. When the amount of the Contract at issue, $6,650.00, is subtracted from the amount that the Claimant paid to the Respondent and for repair work, the difference is $13,802.75.[2] The calculation is as follows:

$ 6,650.00	Amt. Claimant Paid Respondent for Hardiebacker and Tile Install
+ 13,802.75	Amt. Claimant Paid to Repair (including hardwood floor materials)
$ 20,452.75	Total
-$ 6,650.00	Amount of the Contract
$ 13,802.75	Actual Loss

Although the actual loss in this case is $13,802.75, as stated previously, the award is limited by statute to the amount that the Claimant paid to the Respondent for the contractual amount of the tile work done in this case. Md. Code Ann., Bus. Reg. § 8-405(e)(5).

[2] The governing statute provides that the "Commission may not award ... more than $20,000.00 to one claimant for acts or omissions of one contractor[.]" The MHIC's regulations provide that it may not award more than $15,000.00 in such circumstances. *Compare* Md. Ann. Code, Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict. Under well-established principles, I am bound to follow the statute. *Thanner Enterprises v. Baltimore Co.*, 414 Md. 265, 276 (2010).

Accordingly, the Claimant is entitled to reimbursement from the Fund in this case in the amount $6,650.00. *Id.*; COMAR 09.08.03.03(c).

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010). I further conclude that the amount of such actual damages is limited to $6,650.00, the amount that the Claimant paid to the Respondent under the Contract to perform the tile work in this case. Md. Code Ann., Bus. Reg. § 8-405(e)(5)(Supp. 2012).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded $6,650.00 from the Maryland Home Improvement Guaranty Fund;

ORDER that the Respondent be 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.

Signature on File

June 21, 2013
Date Decision Mailed

Marina L. Sabett
Administrative Law Judge

#143313

EXHIBIT
3

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

PROPOSED ORDER

WHEREFORE, this 19th day of July 2013, 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.

Marilyn Jumalon

Marilyn Jumalon
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION