

IN THE MATTER OF THE CLAIM	*	BEFORE THOMAS G. WELSHKO,
OF EMILY MACQUAID & GERALD	*	AN ADMINISTRATIVE LAW JUDGE
GUTIERREZ,	*	OF THE MARYLAND OFFICE
CLAIMANTS	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	OAH No.: DLR-HIC-02-14-40983
IMPROVEMENT GUARANTY FUND	*	MHIC No.: 13 (05) 1210S
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF ALEXANDER	*	
BARABASH, T/A WELSH	*	
CONSTRUCTION REMODELING,	*	
L.L.C.,	*	
RESPONDENTS	*	

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On October 9, 2013, Emily MacQuaid and Gerald Gutierrez (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$167,253.00 in alleged actual losses suffered as a result of a home

improvement contract with Alexander Barabash¹ t/a Welsh Construction Remodeling, LLC (Welsh).

On December 5, 2013, the MHIC transmitted this case to the Office of Administrative Hearings (OAH) for a hearing. The OAH scheduled a hearing in this matter under OAH No. DLR-HIC-02-13-47161, for February 28, 2014, but that hearing was postponed. On May 8, 2014, the MHIC withdrew its delegation of authority for the OAH to conduct a hearing in this matter. Consequently, the OAH closed the case.

On November 18, 2014, the MHIC sent a new delegation of authority to the OAH to conduct a hearing in this matter. Pursuant to that delegation of authority, on December 10, 2014, the OAH sent a notice to the parties, which alerted them that the OAH had scheduled a hearing in this case for January 22, 2015, at the OAH's headquarters in Hunt Valley, Maryland. The OAH gave this case a new case number—DLR-HIC-02-14-40983.

I held a hearing on January 22, 2015, at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (Supp. 2014). The Claimants represented themselves. David Ellin, Attorney-at-Law, represented Respondent Alexander Barabash (Barabash), the license holder for Welsh. Rebecca Daley, Attorney-at-Law, represented Welsh. Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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 (2014); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

¹ Although Mr. Barabash was the license holder for Welsh, Joseph Meyerhoff was the president, chief operating officer (CEO) and owner of Welsh at all times relevant.

ISSUES

1. Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondents'² acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted fifteen exhibits on behalf of the Claimants, no exhibits on behalf of Barabash, one exhibit on behalf of Welsh, and four exhibits on behalf of the Fund. (I have attached a complete Exhibit List as an Appendix to this decision.)

Testimony

Dr. Emily MacQuaid testified on behalf of the Claimants and as an adverse witness for the Fund. Neither Barabash nor Welsh called any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, Welsh was a licensed home improvement contractor under MHIC license number 01-21605. (Fund Ex. 3.)
2. On July 30, 2011, a fire caused extensive damage to the upstairs of the Claimants' home, located on Benston Place in Baltimore City. (Test. Cl.; Cl. Ex. 14.)
3. The fire forced the Claimants and their children to vacate the home. (Test. Cl.)
4. On June 8, 2012, the Claimants and Welsh entered into a contract to have the damage caused by the fire repaired at their Baltimore City residence, along with other extensive

² I will refer to Mr. Barabash and Welsh as "Respondents," because they appeared separately and were each represented by their own legal counsel.

renovations throughout the residence. A representative from Welsh promised the Claimants that Welsh would complete the contracted work by October 2012. (Test. Cl.; Cl. Ex. 1.)

5. The contract called for Welsh to perform renovation work in the following areas of the Claimants' home:

- kitchen;
- dining room;

- living room;
- sunroom;
- stairwell to basement;
- bathroom;
- rear bedroom;
- rear stairwell;
- first-floor landing;
- master bedroom;
- master bedroom bathroom;
- rear bedroom;
- hall bathroom; and
- hallway/stairwell to first floor.³

(Cl. Ex. 1.)

6. The original agreed-upon contract price was \$182,681.09. (Cl. Ex. 1.)

³ The Respondent summarized "O & P" (overhead and profit) items by category. A reproduction of this list appears in Appendix II.

7. The Claimants and Welsh agreed to the following change orders:

Change Orders Agreed Upon by the Parties

<u>Date</u>	<u>Change Order Description</u>	<u>Cost</u>
06/01/2012	Construction of Addition ⁴	\$61,100.00
09/05/2012	Siding removal and installation	\$11,120.00
10/04/2012	Master bathroom (shower demolition, tile work, etc.)	\$13,400.00
10/04/2012	Tree and landscaping work	\$2,880.00
10/04/2012	Chimney Repair Credit	-\$760.00
Total		\$87,740.00

(Cl. Exs. 1 and 15.)

8. The total agreed-upon contract price, after change orders, was \$270,421.09.⁵ (Cl. Ex. 1.)

9. The Claimants financed the fire-repair damage work and other renovations at their home using a U.S. Department of Housing and Urban Development (HUD) 203K loan obtained through Wells Fargo Bank (Bank). (Test. Cl.)

10. The terms of the contract called for the Respondent to bill the Claimants once it completed a certain portion of the contracted work. The Bank would then allow the Respondent

⁴ Dr. MacQuaid testified that she and her husband, Mr. Gutierrez, anticipated having home improvement work done at their property before the fire. That is why the addition contract pre-dates the fire damage-repair contract. For the purposes of this decision, I will refer to both contracts combined as "the contract."

⁵ In the Claimants' summary sheet (Cl. Ex. 15), the Claimants indicate that the total contract price was \$278,829.00. Welsh's computations, however, start with this figure and then add \$28,840.00 in change orders, bringing the total contract price to \$307,669.00. (Resp. Ex. 1). Neither the Claimants nor the Respondent adequately explained how they arrived at the \$278,829.00 figure. The Fund was neutral on this issue. Therefore, I am using numbers derived strictly from the documents. (See Discussion, below.)

to draw a payment for that portion of the work, less a ten percent retainage (holdback), after an independent third-party inspector approved the work. (Test. Cl.; Cl. Ex. 2.)

11. The Claimants paid the following to the Respondent by means of draws made by the Respondent from the Bank:

Draws Taken by the Respondent

<u>Date</u>	<u>Draw</u>	<u>Amount</u>
07/05/2012	1st Draw	\$28,260.00
07/27/2012	2nd Draw	\$43,722.00
10/24/2012	3rd Draw	\$36,180.00
12/07/2012	4th Draw	\$45,109.80
Total		\$153,271.80

(Cl. Ex. 2.)

12. Welsh subcontracted all of the work under the contract to CCM Maintenance, LLC (CCM).⁶ (Test. Cl.; Cl. Exs. 3 and 4.)

13. Welsh's progress in completing the contract was slower than anticipated, so Welsh requested that the Claimants extend the contract completion date to December 26, 2012. The Claimants agreed to this extension. (Test. Cl.; Cl. Ex. 3.)

14. When Welsh had not completed the contract by December 26, 2012, it requested that the Claimants extend the contract completion date to January 14, 2013. The Claimants agreed to this second extension. (Test. Cl.; Cl. Ex. 3.)

⁶ Although CCM performed the work, Welsh was still the general contractor, so I will continue to refer to Welsh as the responsible Respondent in this matter.

15. As of January 14, 2013, Welsh had poorly installed many items specified in the contract or had left many items incomplete. (Test. Cl.)

16. As of January 14, 2013, the following items specified in the contract were poorly installed or left incomplete:

- lead paint through the residence had not been removed in accordance with lead paint removal procedures;
- the hardwood floors on the first, second and third floors were installed defectively;
- a new Trane air conditioning unit had not been installed;
- a water heater had not been installed;
- walls were not properly sanded and painted with primer and two coats of paint;
- the washer and dryer had not been uninstalled;
- ten doors were improperly installed, such that they did not open or close properly;
- new KitchenAid refrigerator, stove foundation, kitchen cabinets, bathroom accessories, toilets, stone patio, new Bosch dishwasher, gutters, window sills, basement storm windows and house windows had been damaged;
- tile had been improperly installed and grout improperly applied;
- HVAC ducts were improperly installed;
- shower stalls were improperly grounded;
- the siding and flashing surrounding the house were defectively installed;
- construction debris was not cleaned up, leaving nails and glass scattered throughout the residence;
- basement work remained completely undone;
- the garage had no insulation;

- plumbing work was poorly done, leading to water pressure problems, and there was improper insulation of pipes throughout the house;
 - the stairs that were installed were defective;
 - the stairs and floors were improperly sanded and stained;
 - carpet runners were not installed;
 - drywall was not properly installed, resulting in holes in the ceilings, in the kitchen, and in closets on the third floor;
-
- plaster ceilings were not properly patched and repaired in the first-floor family room;
 - perimeter electric lighting was improperly installed;
 - the shower door and toilet paper holder were not installed per contract specification;
 - windows were painted shut; and
 - holes in the foundation were not properly insulated.

(Test. Cl.; Cl. Exs. 3, 10 and 11.)

17: Because Welsh had represented to the Bank that it had substantially completed the work, the Claimants and their children were required to move back into the Benston Place residence on January 17, 2013. On January 29, 2013, the presence of lead paint residue compelled them to move out again until the lead residue situation was rectified. (Test. Cl.; Cl. Ex. 10.)

18. In January 2013, the Claimants called and e-mailed Joseph Meyerhoff, the current owner of Welsh, to complain about the defective work and incomplete items at their residence. (Test. Cl.; Cl. Ex. 3.)

19. On January 17, 2013, Mr. Meyerhoff sent a reply e-mail, in which he promised to have Welsh complete the work and “make it right.” (Cl. Ex. 5.)

20. Welsh did not do any work after Mr. Meyerhoff sent his e-mail reply. (Test. Cl.)

21. On February 11, 2013, the Claimants sent a letter by facsimile and first-class mail to Mr. Meyerhoff, to obtain satisfaction regarding the defective and incomplete work performed by Welsh at their residence. The essence of the Claimants' complaints were that (1) Welsh's subcontractor(s) lacked the requisite skill and expertise to perform the work in accordance with the contract, industry standards and applicable codes; (2) the work performed was poorly done and incomplete; and (3) lead abatement work was not done and needed to be completed. The Claimants demanded that Mr. Meyerhoff and Welsh submit a final detailed plan and schedule for addressing their complaints by February 15, 2013, and that all lead removal and abatement work be completed by February 18, 2013. The Claimants also sought the names of all subcontractors used by Welsh. (Cl. Ex. 3.)

22. On February 20, 2013, the Claimants' attorney wrote to Mr. Meyerhoff. The letter from the Claimants' attorney to Mr. Meyerhoff requested (1) the names of all subcontractors used on the project; (2) a date when all required use and occupancy inspections would occur; (3) submission of a plan to rectify all mechanical and ductwork defects by February 21, 2013; and (4) submission of a flooring inspection report by February 21, 2013. (Cl. Ex. 3.)

23. From February 21, 2013 through March 7, 2013, Welsh performed some limited work at the Claimants' residence consisting of sanding/scraping lead paint outside the children's rooms, installing doors in bedrooms and bathrooms, taking away doors secondary to improper priming, caulking outside and placing doors in bedrooms and bathrooms. (Cl. Ex. 4.)

24. On February 27, 2013, the Claimants e-mailed Mr. Meyerhoff about their continued concerns about Welsh's failure to complete the contract satisfactorily. (Cl. Ex. 3.)

25. On March 12, 2013, counsel for CCM informed the Claimants of her intention to file a mechanic's lien against the Claimants' property for \$89,487.56 on CCM's behalf, because Welsh failed to pay CCM for the value of labor and materials that CCM supplied as Welsh's subcontractor. CCM ultimately filed that mechanic's lien with the Circuit Court for Baltimore City. (Test. Cl.; Cl. Ex. 4.)

26. All Service Plumbing also subsequently filed a mechanic's lien because of Welsh's failure to pay it for labor and materials that it provided as Welsh's subcontractor. (Test. Cl.; Cl. Ex. 4.)

27. Correspondence between the Claimants and Mr. Meyerhoff continued throughout March and April 2013. Mr. Meyerhoff answered some of this correspondence, and the Claimants met with him once, but the Claimants ultimately had no success in getting Welsh to address the remaining workmanship issues and incomplete aspects of the contract. (Test. Cl.; Cl. Exs. 3 and 5.)

28. On April 4, 2013, Welsh became insolvent and went out of business.⁷ (Cl. Ex. 4.)

29. When they realized that Welsh would not be able to address their concerns related to defective and incomplete work under the June 8, 2012 contract, the Claimants began seeking estimates from other contractors to repair and complete the work left incomplete by Welsh. (Test. Cl.; Cl. Ex. 6.)

30. On July 15, 2013, the Claimants obtained a deficiency cost estimate from Pella Enterprises, LLC (Pella) for \$197,467.90 to perform work at the Claimants' residence. Of this amount, \$163,226.43 was for the remediation of poorly performed and incomplete work done by Welsh. (Test. Cl.; Cl. Ex. 6; Cl. Ex. 15.)

⁷ As of April 2013, Welsh owed Howard Bank \$2,000,000.00 and had assets of only \$500,000.00, consisting of items such as accounts receivable, furniture, equipment and vehicles.

31. The Claimants did not contract with Pella to perform remedial work at their residence. Instead, they engaged contractors other than Pella to remediate deficiencies in Welsh's work. (Test. Cl.)

32. Porter, Buckley, Eisenbrandt (PBE) performed repair work at the Claimants' property. This work consisted of the following:

- replacing defective tile in the master bathroom shower;
- gutting bathrooms and installing correct backing and insulation;
- repairing duct work;
- replacing galvanized pipes in some areas;
- completing stonework;
- installing water heater;
- repairing gutters;⁸
- performing remaining painting and drywall work;
- bringing the insulation up to code; and
- repairing electrical work to correct deficiencies.

(Cl. Ex. 7.)

33. On August 29, 2013, PBE billed the Claimants \$84,208.00 for the cost of the work that it performed. (Cl. Ex. 7.)

34. The Claimants negotiated a \$32,500.00 settlement with CCM to have its mechanic's lien released. (Test. Cl.; Cl. Ex. 15)

⁸ Welsh did not include repairing gutters in its contract; I infer that it was necessary for PBE to repair gutters, so it could repair the siding. This would make gutter repair a non-reimbursable consequential item. However, there is no way to subtract the cost of gutter repair from the PBE total, because PBE did not itemize costs. Nevertheless, I believe that the cost of the repairing gutters is *de minimis* when considering the total costs of repair. Therefore, its inclusion in the cost of repair total would not affect the overall outcome of this case

35. To date, the Claimants have paid the following to contractors (or suppliers) for remedial work performed at their residence other than that included in the primary PBE contract:

Costs Already Paid by the Claimants

<u>Date</u>	<u>Contractor/Repair</u>	<u>Cost</u>
12/18/2012	The Home Depot - Shower door purchase	\$457.80
05/14/2013	Baltimore Gas & Electric (BGE) – air conditioning	\$99.00
04/15/2013	Bob's Garage Door – garage door electrical work	\$149.00
08/29/2013	PBE – master bath repairs	\$10,260.00
Total		\$10,965.80

(Test. Cl.; Cl. Exs. 7, 8 and 15.)

36. To date, the Claimants have received estimates from the following contractors to have remedial work performed at their residence other than that included in the primary PBE contract:

Cost Estimates Obtained by the Claimants

<u>Date</u>	<u>Contractor/Repair</u>	<u>Cost</u>
05/25/2013	Delano's, Inc. – hardwood floor repair	\$39,750.00
06/04/2013	Rick of Westwood, Inc. – HVAC replacement ⁹	\$47,919.00
Total		\$87,669.00

(Cl. Ex. 9.)

⁹ Dr. MacQuaid testified that this work was actually done.

37. To date, the Claimants have expended or will be obligated to expend \$182,842.80 to have Welsh's poor and incomplete work redone or completed. (Test. Cl.; Cl. Exs. 7, 8 and 9.)

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. 2014); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimants have proven eligibility for compensation.

Welsh was a licensed home improvement contractor at the time that it entered into the contract with the Claimants. Nevertheless, Michael Balcer held the license for Welsh until August 30, 2012; Alexander Barabash held the license from August 30, 2012 until Welsh went out of business on April 4, 2013. Although he was not the license holder *per se*, Joseph Meyerhoff actually owned Welsh at all times relevant.

The Claimants qualify as owners because the structure where Welsh performed the work was the Claimants' primary residence. Furthermore, no preliminary bars to the Claimants' recovering from the Fund (for example, being related to Respondents Balcer or Barabash, recovering from the Respondent in a court action, etc.) existed.

There is no dispute that Welsh performed work poorly, left many items incomplete and, for all practical purposes, abandoned the contract. Additionally, the Claimants have documented that they sustained at least \$20,000.00 in actual losses compensable by the Fund.

I will summarize the salient facts of this case as testified to by Dr. MacQuaid. On July 30, 2011, a fire caused extensive damage to the Claimants' Baltimore City home. Nearly a year later, on June 8, 2012, the Claimants entered into a contract with Welsh to have that fire damage repaired. Welsh's contract price for repairing the fire damage was \$182,681.09; it also integrated a contract for building an addition into this primary contract. The addition part of the contract was for an additional \$61,100.00. Change orders totaling \$26,640.00 brought the ultimate contract price to \$270,421.09 ($\$182,681.09 + \$61,100.00 + \$26,640.00$). (The Claimants contend that the final contract price was \$278,829.00; however, the documentary evidence submitted by the Claimants does not support this figure.)

When the Claimants entered into their contract with Welsh, they had no idea that Welsh was already in financial difficulty. By June 2012, it apparently had no employees on its payroll who could have performed the contracted work. That is why Welsh subcontracted with CCM to perform the work delineated in the Claimants' contract.

Welsh/CCM began working shortly after the parties finalized the contract. Welsh had initially promised the Claimants that all the work would be done by October 2012. It remained incomplete by the end of that month. Consequently, Welsh asked for an extension of the contract completion date. The new agreed-upon completion date was December 26, 2012. Similarly, that date came and went. In January 2013, the work had slowed to a crawl and remained incomplete. Welsh, however, misrepresented to the Bank that the work was substantially complete, so the Bank required the Claimants to move back into the home on January 17, 2013, even though much remained to be done.

The Claimants had to move out of their residence only twelve days after moving back in, because Welsh had done such a poor job of lead abatement that their children were exposed to

lead residue throughout their residence. (The pediatrician for the Claimants' children ordered the Claimants to vacate their home before their children started showing symptoms of lead poisoning.) Moreover, the Claimants had to live in "filthy" conditions overall, because Welsh had not done the cleanup work that was specified in the contract. Moreover, the Claimants had to contend with defective flooring, an inoperable HVAC system, damaged appliances and poor plumbing, among numerous other problems.

From January through April 2013, the Claimants attempted, without success, to get Welsh to repair poorly installed items and complete those items in the contract left incomplete. They had extensive correspondence with Welsh's owner, Joseph Meyerhoff, by both regular mail and e-mail. They even engaged legal counsel to demand that Welsh finish the job. Again, unknown to the Claimants, Welsh was insolvent. It owed Howard Bank approximately \$2,000,000.00 and had assets of about \$500,000.00, which consisted of essentially non-liquid items, such as accounts receivable, furniture, equipment and vehicles. Welsh was in no position to complete the contract. The company folded on April 4, 2013.

As if the scenario could not have gotten any worse, Welsh had not paid its primary subcontractor CCM, which resulted in CCM filing an \$89,487.56 mechanic's lien against the Claimants' property. (The Claimants suggest that CCM had amended its mechanic's lien to \$122,009.00 at one point.) All Service Plumbing also filed a mechanic's lien against the Claimants, but, to date, it has not sought to collect what it is owed by Welsh from the Claimants. According to Dr. MacQuaid, she and her husband had to pay \$32,500.00 to settle CCM's claim for payment to get the mechanic's lien released. This did not include another \$20,000.00 in attorneys' fees, which the Claimants knew, by law, they could not recover from the Fund. They

also made a \$34,000.00 credit card payment for one of Welsh's outstanding bills, which the credit card company ultimately refunded to the Claimants.

There is no question that Welsh did poor work and left numerous items incomplete. On these bases, the Claimants have made a *prima facie* case for Fund reimbursement eligibility.

Having found eligibility for potential compensation, I now turn to the amount of the award, if any, to which the Claimants are entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest.

COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

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

COMAR 09.08.03.03B(3)(c).

The Claimants contend that they are entitled to reimbursement of \$20,000.00 from the Fund, the maximum amount recoverable. In their closing, however, the Claimants could not offer a specific figure as the cost of repair and completion. Although they wrote \$167,253.00 in the space for claim amount on their claim form (Fund Ex. 4), they arrived at this amount by relying exclusively on the Pella estimate, minus items in that estimate that they knew were not compensable. Nevertheless, at the hearing, the Claimants did *not* rely on the Pella estimate to arrive at their repair and completion costs. Instead, they offered proposals and invoices from

other contractors or suppliers, such as PBE, BGE, The Home Depot, Delano's, Inc., Rick's of Westwood, Inc., and Bob's Garage Door. This dual submission of Pella's theoretical costs, as well as actual expenditures and contractor estimates, has proven a challenge in arriving at the true cost of repair and completion as a precursor to calculating any actual loss.¹⁰

Welsh, and by extension, Barabash, argue that the Claimants are not entitled to reimbursement from the Fund because the Claimants still owe Welsh \$151,162.48. Welsh arrived at this figure by taking the contract price of \$278,829.00 (which, as noted, the Claimants' documentation does not support) and adding \$28,840.00 in change orders for a total contract price of \$307,669.00. Welsh then subtracted the \$153,271.80 paid by the Claimants to Welsh under the draw schedule, as well as \$3,234.72 in credits owed to the Claimants by Welsh. (*See* Resp. Ex. 1). I do not accept Welsh's accounting. I reject the premise that the Claimants "owe" Welsh any money, because Welsh did not complete and had no means of completing the contract. Additionally, the formula contained in COMAR 09.08.03.03B(3)(c) takes into account the original contract price.

The Fund concedes that Welsh performed the contract poorly and left many items incomplete. Nevertheless, it asserted that it is difficult to determine the Claimants' actual loss, because of the Claimants' mixed reliance on the Pella and PBE estimates, other contractor estimates, and invoices. Consequently, the Fund made no recommendation concerning the validity of the Claimants' claim.

¹⁰ The Claimants also included receipts for getting a Baltimore City occupancy permit and blinds from Next Day Blinds. Permit costs are clearly consequential and, therefore, unrecoverable. With regard to the blinds, section 8-101(g)(1) generally defines a home improvement as "(i) 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; or (ii) an improvement to land adjacent to the building." The installation of window blinds does not fit this definition, as they are not permanently affixed to the Claimants' house as a sink, for example, would be. Md. Code Ann., Bus. Reg. § 8-101(g)(1) (2010).

I conclude that the only way to measure the Claimants' potential actual loss is to rely solely on those costs or estimates that they have documented—as opposed to using the Pella estimate. As noted, I cannot use the Pella estimate, because the Claimants did not actually contract with Pella to do any work. Similarly, I cannot use a mix of Pella items and actual expenditures, because that might result in an inaccurately high or low cost of repair and completion. I also cannot consider costs or estimated costs unsupported by documentary evidence. Furthermore, I cannot consider the amount that the Claimants paid to CCM to have its mechanic's lien released, because that is clearly a consequential item. (If the damage alleged does not relate to the actual repair of an item in the contract that needs remediation, that damage would be consequential. *See CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 411 – 13 (2012).) I cannot consider any other consequential items (occupancy permit costs, inspection costs, etc.) as well.

The Claimants have documented that they paid \$84,208.00 to PBE for various types of work, such as replacing defective bathroom tile in the shower, repairing ductwork, installing insulation, painting and drywall work and so on. They incurred \$10,965.80 in having master bath repairs done by PBE, along with other minor items such as repairing the air conditioning, purchasing a shower door, and having electrical work done on their garage door. They received two estimates for hardwood floor repair from Delano's, Inc. (I am using \$39,750.00, the lower of the two) and a \$47,919.00 estimate for HVAC replacement from Rick's of Westwood, Inc. Welsh contends the HVAC system could be repaired, not replaced. Welsh, however, offered no evidence to support its argument. By contrast, the Claimants offered the January 30, 2013 report of Superior Home Inspectors, LLC, the February 16, 2013 report of Gene Wemple Repairs, Inc., and the March 13, 2013 report of Spears/Votta Associates, Inc., all of which support their

contention that HVAC system removal and replacement is necessary because of Welsh's poor installation of that system. (Cl. Ex. 12). The combined total of these repair and completion costs is \$182,842.80.

In light of the above, using the formula prescribed in COMAR 09.08.03.03B(3)(c), I have determined that the Claimants have proven that they have sustained an actual loss:

\$153,271.80	Amount paid by the Claimants to or in behalf of the Respondent
+\$182,842.80	Reasonable cost of repair and completion
\$336,114.60	
-\$270,421.09	Original contract price (combined contracts) ¹¹
\$65,693.51	Actual loss by the Claimants

Although the Claimants have demonstrated an actual loss of \$65,693.51, section 8-405(e)(1) of the Business Regulation Article caps recovery from the Fund at \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2014). Therefore, the Claimants are eligible to receive that maximum amount as their compensable loss from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2010 & Supp. 2014).

¹¹ Even using \$278,829.00 as the contract price, the Claimants would have still qualified to receive the \$20,000.00 maximum reimbursable amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$20,000.00; and

ORDER that the Respondent(s) Welsh and Barabash are ineligible for a Maryland Home Improvement Commission license until they reimburse the Guaranty Fund for all monies

disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission. 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

April 8, 2015
Date Decision Issued

⤵ _____
Thomas G. Welshko
Administrative Law Judge

TGW/tc
#155320

IN THE MATTER OF THE CLAIM	* BEFORE THOMAS G. WELSHKO,
OF EMILY MACQUAID & GERALD	* AN ADMINISTRATIVE LAW JUDGE
GUITIERREZ,	* OF THE MARYLAND OFFICE
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APPENDIX I
FILE EXHIBIT LIST

Claimants' Exhibits:

1. 2012 Bank information, June 2012 contract(s) and change orders
2. Draws made by Welsh, July through December 2012
3. February through April 2013 correspondence between the Claimants and Welsh
4. 2013 various e-mails, mechanic's lien notices and other documents
5. Correspondence between the Claimants and Joseph Meyerhoff and other Welsh representatives, 2012 - 13
6. July 15, 2013 Pella Enterprises, LLC estimate
7. August 29, 2013 estimate/invoices from Porter, Buckley, Eidenbrandt

8. 2013 – various invoices, checks, etc. and January 30, 2013 Superior Home Inspectors, LLC, report
9. May 25, 2013 Delano's, Inc.. proposal and June 4, 2013 Rick of Westwood, Inc.'s proposal
10. July 17, 2013 Inspection Report by Andy Gorelick
11. 2013 photographs of problems with Welsh's work (list of photographs included)
12. 2013 Lumber Liquidators report and Wemple and Spears Votta reports
- ~~13. DLLR fines against unlicensed subcontractors that worked on the contract and other miscellaneous documents~~
14. February 8, 2013 insurance claim denial
15. Undated Spreadsheet showing costs

Respondent-Welsh's Exhibit:

1. Welsh's Accounting

Guaranty Fund's Exhibits:

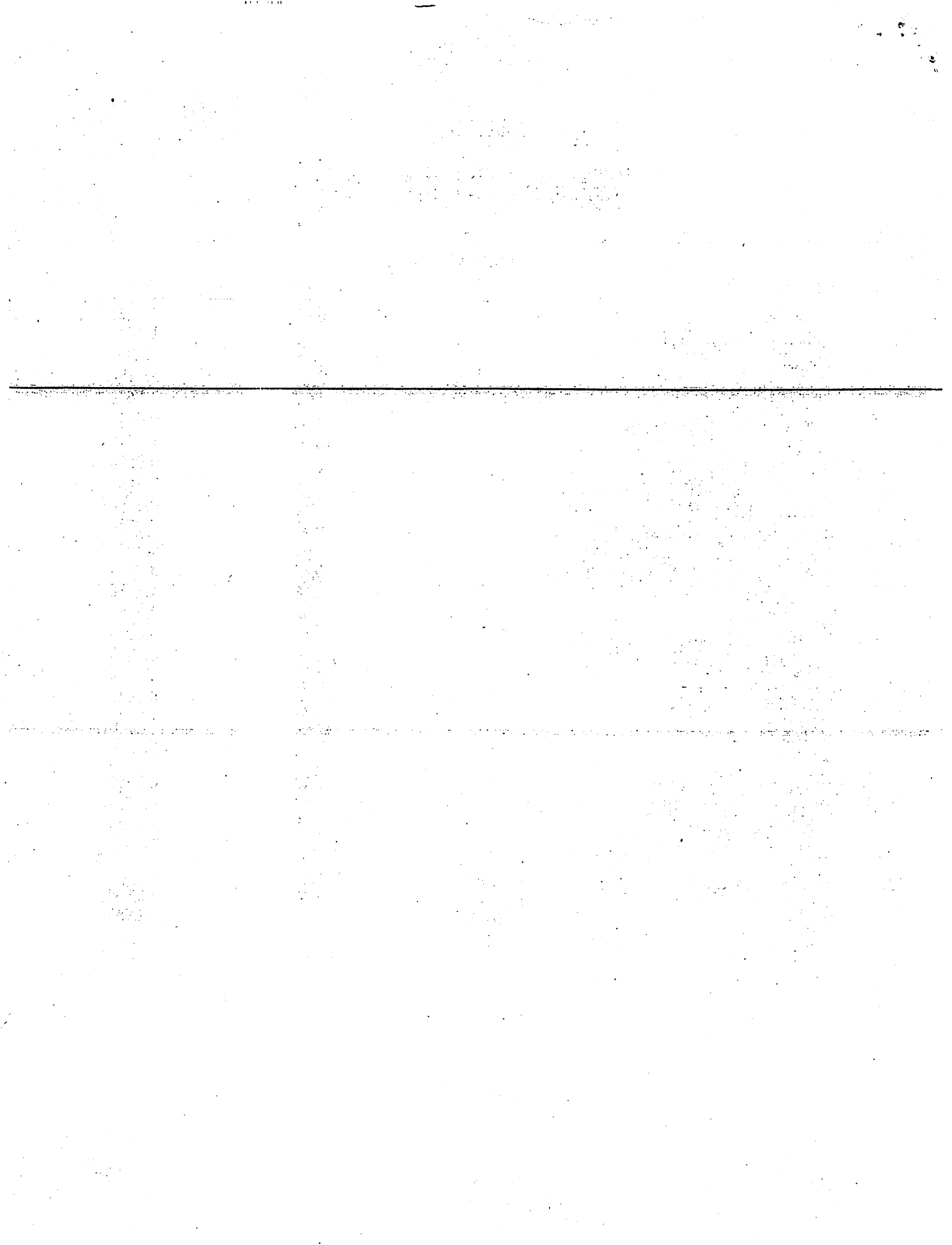
1. December 10, 2014 Hearing Notice
2. December 2, 2013 MHIC Hearing Order
3. January 14, 2014 Licensing Record for Welsh
4. October 9, 2013 Claim Form filed by the Claimants with the MHIC

APPENDIX II

Overhead and Profit Items by Category
Rather than Location in the Residence

Recap by Category

O & P Items	Total Dollars	%
CLEANING	8,627.13	4.72%
GENERAL DEMOLITION	2,080.00	1.14%
DOORS	1,993.20	1.09%
DRYWALL	9,880.98	5.41%
ELECTRICAL	4,307.68	2.36%
FLOOR COVERING - CARPET	981.19	0.54%
FLOOR COVERING - WOOD	18,936.93	10.37%
PERMITS AND FEES	1,757.30	0.96%
FINISH CARPENTRY/TRIMWORK	4,490.05	2.46%
FINISH HARDWARE	384.56	0.21%
FRAMING & ROUGH CARPENTRY	10,724.45	5.87%
GLASS, GLAZING, STOREFRONTS	650.30	0.36%
HEAT, VENT & AIR CONDITIONING	10,412.68	5.70%
INSULATION	2,103.44	1.15%
LABOR ONLY	4,683.20	2.56%
MARBLE - CULTURED OR NATURAL	159.99	0.09%
INTERIOR LATH & PLASTER	1,696.00	0.93%
PLUMBING	6,766.87	3.70%
PAINTING	16,061.81	8.79%
ROOFING	27,600.00	15.11%
STAIRS	892.62	0.49%
TILE	2,110.19	1.16%
TEMPORARY REPAIRS	1,326.32	0.73%
WINDOW TREATMENT	682.64	0.37%
WINDOWS - VINYL	2,292.12	1.25%
<hr/> Subtotal	<hr/> 141,601.65	<hr/> 77.51%
Material Sales Tax	@ 6.000%	2,810.28 1.54%
Overhead	@ 15.00%	21,661.79 11.86%
Profit	@ 10.00%	16,607.37 9.09%
<hr/> O&P Items Subtotal	<hr/> 182,681.09	<hr/> 100.00



PROPOSED ORDER

WHEREFORE, this 13th day of May, 2015, 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