

DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

MARTIN O'MALLEY, Governor
ANTHONY G. BROWN, Lt. Governor
THOMAS E. PEREZ, Secretary

Division of Occupational & Professional Licensing
Maryland Home Improvement Commission
Stanley J. Botts, Commissioner

DLLR Home Page • <http://www.dllr.state.md.us>
DLLR E-mail • dllr@dllr.state.md.us

IN THE MATTER OF
OF EDWARD MORENO
t/a BUILDERS & MORE, INC.
AND THE CLAIM OF
RICHARD D. FREED
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND

* MARYLAND HOME
* IMPROVEMENT COMMISSION

* MHIC CASE NO. 07 (75) 2064

* * * * *

FINAL ORDER

WHEREFORE, this 23RD day of December, 2009, Panel B of the Maryland

Home Improvement Commission ORDERS that:

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:
 - A) By letter dated December 9, 2009 to the Commission, the Claimant has stipulated that he did not amend his original Guaranty Fund claim amount, and that he does not seek recovery from the Guaranty Fund in excess of his original claim amount.
 - B) The original Guaranty Fund claim filed by the Claimant was in the amount of \$11,000.00. (GF Exhibit 4).
- 3) The Recommended Order of the Administrative Law Judge is Amended as follows:
 - A) The Claimant is Awarded a total of \$11,000.00 from the Guaranty Fund.



Final Order - 07 (75) 2064
In The Matter of the Claim of
Richard D. Freed
December 23, 2009
Page 2

- 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.**

I. Jean White _____
Chairperson - Panel B
MARYLAND HOME IMPROVEMENT
COMMISSION

IN THE MATTER OF THE CLAIM OF	* BEFORE KATHLEEN A. CHAPMAN,
RICHARD D. FREED	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-08-46267
OMISSIONS OF EDWARD MORENO,	* MHIC NO.: 07 (75) 2064
v/a BUILDERS & MORE, INC.	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On January 7, 2008, Richard D. Freed (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,000.00 for actual losses allegedly suffered as a result of a home improvement contract with the Edward Moreno, v/a Builders & More, Inc. (Respondent).

I held a hearing on August 4, 2009 at the Office of Administrative Hearings (OAH) – Wheaton, Westfield North, Suite 205, 2730 University Boulevard, West, Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (Supp. 2009). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department),

represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

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), Code of Maryland Regulations (COMAR) 09.01.03, 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:

- Clmt #1 - Notes to the MHIC from the Claimant, August 4, 2009
- Clmt #2 - Job Proposal, September 7, 2006
- Clmt #3 - Description of Expenditures, including the following:
 - Case Design Contract, May 30, 2007
 - Jorge N. Fajardo, Painting Services, September 14, 2007
 - Plumbing Parts Plus receipt, August 11, 2007
 - Expo Design Center receipt, August 6, 2007
 - Plumbing Parts Plus receipt, September 4, 2007
 - Architectural Ceramics receipt, August 7, 2007
- Clmt #4 - Copies of three cancelled checks (#5723, for \$29,645.00; #5718, for \$11,000.00; and #5712, for \$11,000.00)
- Clmt #5 - MHIC Complaint form, March 5, 2007
- Clmt #6 - Notice to Owner or Owner's Agent of Intention to Claim a Lien, undated
- Clmt #7 - Letters from the Claimant to Peter Barboza, Investigator, MHIC (April 12, 2007, May 11, 2007, May 24, 2007, May 30, 2007, and August 1, 2007)

- Clmt #8 - Letters from MHIC to Claimant (April 11, 2007, March 19, 2008, and November 24, 2008); Letter from MHIC to Respondent, February 20, 2008
- Clmt #9 - Home Improvement Claim Form, January 7, 2008; Letter from Claimant to Monica Rauch, Investigator, MHIC, January 8, 2007
- Clmt #10 - Four color photographs of caulking around the bathtub

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

- GF #1 - Notice of Hearing, March 30, 2009, sent by certified and regular mail to the Respondent at his business address (25109 Woodfield Road, Damascus, MD 20872); the certified mailing was unclaimed
- GF #2 - Transmittal; Hearing Order, October 24, 2008
- GF #3 - Computerized print-out showing the Respondent's licensure history
- GF #4 - Letter from John Borz, Chairman, MHIC, to Respondent, February 20, 2008; Home Improvement Claim Form, January 7, 2008

I did not admit any exhibits on the Respondent's behalf since he failed to appear.

Testimony

The Claimant testified and presented no additional witnesses. As the Respondent failed to appear, no witnesses testified in his behalf. The Fund presented no witnesses.

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 #01-50741.
2. On September 7, 2006, the Claimant and the Respondent entered into a contract (Job Proposal) to remodel the Claimant's master bathroom by tearing out the existing area back

down to stud and then installing fixtures, a tub, new plumbing as well as necessary electrical work.¹

3. The original agreed upon contract price was \$33,105.00. The Claimant paid the Respondent an initial down payment in the amount of \$11,000.00 at the time he signed the contract.

4. The Respondent began work on the project on September 26, 2006 and a second \$11,000.00 was paid to the Respondent at that time.

5. In order to install new plumbing for the master bathroom, the Respondent needed to tear out the ceiling drywall in the basement.

6. The Respondent and his crew quickly tore out the basement ceiling, but in doing so caused a portion of raw soil, along the top of the cinderblock foundation wall, to be uncovered.

7. The ceiling remained exposed for approximately eight weeks while waiting for the plumbing work to be performed. In the meantime, no corrective actions were taken to cover the raw soil.

8. The Claimant questioned the Respondent about the work stoppage and the Respondent told him that his plumber, George E. Mandley, Jr., was delayed by another job.

9. The Claimant offered to hire his own plumber, but the Respondent declined indicating that he was obligated, under contract, to have Mr. Mandley perform the work.

¹ The contract also included the installation of new windows. However, the Claimant is not claiming any damages from that aspect of the contract.

10. Soon thereafter, Mr. Mandley contacted the Claimant and told him that the Respondent had given him several bad checks and that he would not perform any work under the contract.

11. Thereafter, the Claimant contacted his own plumber, Paul L. Friedman Company, to perform the work.

12. The Claimant paid Mr. Friedman \$3,500.00. The Job Proposal provided an allowance of \$7,500.00 for the same work that was to be performed by Mr. Mandley.

13. At some point thereafter, the parties entered into an addendum contract. A subsequent Job Proposal, undated and unsigned, delineated additional work to be performed to complete the remodeling project. Under the terms of this Job Proposal, the Claimant was given credit for the monies he paid to Mr. Friedman. The cost for the additional work was \$18,540.00, for a total of \$51,645.00.

14. The main purpose of the master bathroom remodeling project was to convert a stand up shower unit into a combination tub and shower unit.

15. The Claimant purchased a Kohler "Grecian tub" specifically for this home improvement because it was the only one he could find that would fit in the small bathroom space.

16. The Claimant clearly communicated to the Respondent, from the outset, that he wanted a combination tub and shower unit using the Grecian tub.

17. In fact, the plumbers who worked on the project installed hardware and piping consistent with this objective to switch the water inlet from the use of a tub to a shower.

18. However, in December 2006, near the completion of the project, the Claimant discovered that the shower was unusable because the Respondent erroneously installed a large

frame around the tub resulting in a trough at the rim of the tub. The trough would trap water from the shower head when in use and send it gushing directly onto the floor.

19. When the Claimant confronted the Respondent regarding this, the Respondent stated that he believed he was installing a soaking tub and that it was not intended to be a shower/tub.

20. The Claimant also discovered that the tub had limited usefulness as a bath, as well. The wall on which the spigot was installed was too far from the tub. As a result, the spigot barely extended far enough to deliver water into the tub.

21. In addition, the Claimant realized that the improper tub installation ate up so much space between the tub and the bathroom door that the area was no longer usable for amenities the Claimant clearly communicated to the Respondent that he needed to store there.

22. In addition, the Claimant found other problems with the Respondent's performance on the bathroom remodeling project. Specifically,

- a. Instead of installing the medicine cabinet *in* the wall, the Respondent installed it *on* the wall;
- b. The master bathroom toilet was removed during the remodeling work, but when it was re-installed it rocked when used. The rocking was due to a severely damaged insulation ring;
- c. A great deal of grout and caulking had to be removed and replaced due to numerous cracks found at or about the tub and throughout the newly remodeled bathroom area;
- d. There was a sizeable hole in the drywall that was not covered by the newly installed tiles in the bathroom;

- e. There were crude and unsightly openings in the wall tiles to accommodate electrical outlets and controls that extended beyond the switch plates;
- f. The soap dish over the tub was cracked when the tub was installed;
- g. The surface of the tub is uncomfortably rough due to damage caused by the Respondent when installing it;
- h. There was no access panel for the tub;
- i. The exhaust fan installed by the Respondent was so noisy that the Claimant could not use it; and
- j. The Respondent improperly re-installed the sink assembly in the master bathroom. The sink did not drain well and a poor pipe connection caused water to leak through to the basement ceiling.

23. The Respondent's last date of work at the home was on December 7, 2006.

24. On January 30, 2007, Mr. Mandley served the Claimant with a "Notice of Intention to Claim a Lien" (Clmt Ex. #5). The Claimant learned that the Respondent did not pay Mr. Mandley for some work he performed on the project.

25. The Respondent agreed to return to the home on February 13, 2007 to repair some of the work complained of above, but called the Claimant to cancel at the last minute because of snow.

26. The Respondent never returned to the Claimant's home to perform remedial work.

27. The Claimant paid the Respondent the following sums of money:

Deposit at signing (September 7, 2006)	\$ 11,000.00
Payment at start of project (September 26, 2006)	11,000.00
<u>Other payments made during the project:</u>	
• November 20, 2006	<u>29,645.00</u>
Total paid	\$ 51,645.00

28. The Claimant paid two contractors to repair the work performed by the Respondent in the master bathroom, plus he paid for various hardware items out-of-pocket. The amounts paid are as follows:

Case Design (corrective work), May 30, 2007	\$ 10,925.22
Jorge N. Fajardo (painting services), September 14, 2007	495.00
Plumbing Parts Plus (bathroom spigot for shower), August 11, 2007	66.70
Expo Design Center (shower assembly for tub), August 6, 2007	364.62
Plumbing Parts Plus (control unit for tub), September 4, 2007	149.95
Architectural Ceramics (wall tiles), August 7, 2007	124.88
Architectural Ceramics (wall tiles), August 18, 2007	<u>232.00</u>
	\$ 12,358.37

29. The Claimant's actual loss is \$12,358.37.

DISCUSSION

I. The Respondent's failure to appear.

Section 8-312(a) of the Business Regulation Article provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus. Reg. § 8-312(a) (Supp. 2009). On March 30, 2009, a Notice of Hearing was sent to the Respondent at his business address of record by certified and regular mail. (GF Ex. #1.) The certified mailing was returned to the OAH as unclaimed, however, the regular mailing was not returned as undeliverable by the United States Postal Service.

A hearing was scheduled on August 4, 2009 at 10:00 a.m.; however, the Respondent failed to appear for the hearing. Under Md. Code Ann., Bus. Reg. § 8-312(h)(2004), "[i]f, after due notice, the person against whom the action is contemplated does not appear ... the Commission may hear and determine the matter."

Based upon the evidence before me, I am satisfied that the MHIC properly notified the Respondent of the date, time and location of the hearing of the scheduled hearing. Accordingly, when the Respondent was still not present by 10:15 a.m., the hearing proceeded in his absence.

II. The merits of the case.

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. 2009). *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 (2004). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent performed unworkmanlike home improvement. Initially, the Claimant testified that he was satisfied with the work performed—the Respondent and his crew were quick to gut the basement bathroom to allow for the installation of the plumbing to be used in the master bathroom renovation. He also felt that the Respondent and his crew showed great respect for his home. The Claimant's satisfaction with the work, however, soured swiftly when the basement was exposed for nearly two months without any progress on the plumbing installation. As a consequence, dust and dirt circulated throughout the basement and the rest of the house unabated. The Claimant testified that he was greatly concerned for his and his wife's health during this period. Another issue arose when the Respondent purchased bathroom accessories without first consulting the Claimant. The Claimant testified that he ultimately began purchasing the items himself, but that presented an entirely different set of problems. He

found that the Respondent's crew was not careful in their handling of the packaging resulting in certain items being improperly installed or installed in places where they did not belong. When the Claimant contacted the Respondent to complain about this, the Respondent disregarded his concerns and said, "I can't baby-sit that job." The Claimant indicated that many of the improperly installed accessories have remained in the home because it is not cost-effective to remove and replace them.

The Claimant persuasively testified that everything the Respondent did with regard to the tub installation was done incorrectly. The Claimant explained that the space in the master bathroom was quite small. Therefore, he had to be selective and choosy about the placement and what products were to be used in that space. In other words, the installation of everything from the tub, to the towel bars, to the medicine cabinet, to the shelving needed to be orchestrated perfectly in order for it to all fit in the bathroom. The Claimant believed that the Respondent understood this as well, but he was wrong. This was apparent by the manner in which the tub was installed. By placing a large frame around the tub, the Claimant testified that he lost valuable wall and floor space for other items, for instance, the clothes hamper could no longer fit in the bathroom. Although this may seem insignificant, it was important to the Claimant and his wife.

Furthermore, the Claimant persuasively testified, and provided documentation from Case Design, to show that the Respondent's actions produced an overall effect of shoddy workmanship and irresponsibility. These deficiencies are described in detail in Findings of Fact # 14 through 22. Therefore, based on the testimony and evidence before me, I find that the Respondent performed unworkmanlike, inadequate, and incomplete home improvement.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement 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 uncontradicted evidence establishes that the Respondent did not perform the home improvement work at the Claimant's home in an workmanlike, adequate, or complete manner. The Claimant provided receipts from Case Design, Architectural Ceramics, Expo, Plumbing Parts Plus, and Jorge Fajardo (Clmt. Ex. #3) to establish the amount of money he paid in order to repair and/or complete the work.

Thus, the calculations under COMAR 09.08.03.03B(3)(c) establish the Claimant's loss as follows:

Paid to contractor under contract	\$ 51,645.00
Amount to be paid to another contractor to correct/complete work	+ <u>12,358.37</u>
	\$ 64,003.37
Original contract price	- <u>51,645.00</u>
Total	\$ 12,358.37

III. Amendment of the Claim

The original claim against the Fund was for \$11,000.00. The Claimant provided

documentation and testified that the cost to correct the Respondent's work is \$12,358.37. At the conclusion of the hearing, the Claimant requested leave to amend the claim against the Fund to \$12,358.37.

With regard to the amendment of Guaranty Fund claims, COMAR 09.08.03.02C provides as follows:

C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

- (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
- (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

The Fund agreed that the proposed amendment to the claim was proper and would not prejudice the Respondent. I agree. The Claimant submitted numerous documents to the Fund since filing the Claim, with copies to the Respondent, outlining his concerns and the cost to correct the work performed. (Clmt Ex. #7 and 9.) The description of expenditures was frequently noted in the Claimant's correspondence to the Fund. Therefore, the Respondent had adequate notice of the amended claim amount.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$12,358.37 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

RECOMMENDED ORDER

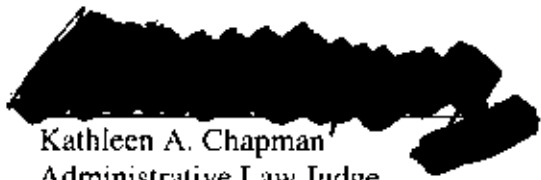
I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,358.37; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411 (2004); and

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

November 2, 2009
Date decision mailed



Kathleen A. Chapman
Administrative Law Judge

KAC/ch
109015

IN THE MATTER OF THE CLAIM OF	* BEFORE KATHLEEN A. CHAPMAN,
RICHARD D. FREED	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-08-46267
OMISSIONS OF EDWARD MORENO	* MHIC NO.: 07 (75) 2064
t/a BUILDERS & MORE, INC.	*

* * * * *

FILE EXHIBIT LIST

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

- Clmt #1 - Notes to the MHIC from the Claimant, August 4, 2009
- Clmt #2 - Job Proposal, September 7, 2006
- Clmt #3 - Description of Expenditures, including the following:
 - Case Design Contract, May 30, 2007
 - Jorge N. Fajardo, Painting Services, September 14, 2007
 - Plumbing Parts Plus receipt, August 11, 2007
 - Expo Design Center receipt, August 6, 2007
 - Plumbing Parts Plus receipt, September 4, 2007
 - Architectural Ceramics receipt, August 7, 2007
- Clmt #4 - Copies of three cancelled checks (#5723, for \$29,645.00; #5718, for \$11,000.00; and #5712, for \$11,000.00)
- Clmt #5 - MHIC Complaint form, March 5, 2007
- Clmt #6 - Notice to Owner or Owner's Agent of Intention to Claim a Lien, undated
- Clmt #7 - Letters from the Claimant to Peter Barboza, Investigator, MHIC (April 12, 2007, May 11, 2007, May 24, 2007, May 30, 2007, and August 1, 2007)
- Clmt #8 - Letters from MHIC to Claimant (April 11, 2007, March 19, 2008, and November 24, 2008); Letter from MHIC to Respondent, February 20, 2008

Clmt #9 - Home Improvement Claim Form, January 7, 2008; Letter from Claimant to Monica Rauch, Investigator, MHIC, January 8, 2007

Clmt #10 - Four color photographs of caulking around the bathtub

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

GF #1 - Notice of Hearing, March 30, 2009, sent by certified and regular mail to the Respondent at his business address (25109 Woodfield Road, Damascus, MD 20872); the certified mailing was unclaimed

GF #2 - Transmittal: Hearing Order, October 24, 2008

GF #3 - Computerized print-out showing the Respondent's licensure history

GF #4 - Letter from John Borz, Chairman, MHIC, to Respondent, February 20, 2008; Home Improvement Claim Form, January 7, 2008

I did not admit any exhibits on the Respondent's behalf since he failed to appear.

PROPOSED ORDER

WHEREFORE, this 7th day of December 2009, 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