

THE MARYLAND HOME
IMPROVEMENT COMMISSION

v.

DAVID B. BARKLEY,
t/a OMEGA CONSTRUCTION &
REMODELING,

RESPONDENT

AND THE CLAIM OF

ANDREW AND PAGE LINDEN,

CLAIMANTS

AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR ALLEGED VIOLATIONS OF
DAVID B. BARKLEY,
t/a OMEGA CONSTRUCTION &
REMODELING,

* BEFORE DAVID HOFSTETTER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

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* OAH NO.: DLR-HIC-04-07-12125

* MHIC NO.: 06 (90) 2368

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On April 4, 2006, Andrew and Page Linden (Claimants) filed a complaint with the Maryland Home Improvement Commission (MHIC) and, on June 29, 2006, a claim against the MHIC Guaranty Fund (Fund) for reimbursement of \$16,506.44 for losses allegedly suffered as a result of the alleged incomplete and unworkmanlike performance of David B. Barkley, t/a Omega

Construction and Remodeling. (Respondent). On March 23, 2007, the MHIC charged the Respondent with incomplete and unworkmanlike work, in violation of Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2004).

Procedure in this case is governed by the 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 (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and COMAR 28.02.01.

On May 3, 2007, the OAH sent the parties notice, at their addresses of record, of a hearing to be held at 10:00 a.m. on October 17, 2007 at the Maryland Department of Agriculture in Annapolis. The Respondent signed a postal certification indicating receipt of the notice.

On September 28, 2007, the Respondent requested a postponement, stating that he would be out of town on October 17, 2007, due to business related to the death of his wife's uncle. The OAH Postponement Officer requested that the Respondent provide documentation of his anticipated travel. No such documentation was received and, on October 11, 2007, the postponement request was denied.

I conducted the hearing, as scheduled, on October 17, 2007. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004). Christopher King, Assistant Attorney General, represented the MHIC. Hope D. Miller, Assistant Attorney General, represented the Fund. The Claimants appeared and represented themselves. Despite proper notice, the Respondent failed to appear and the hearing was held in his absence. Md. Code Ann., Bus. Reg. §§ 8-312(h) (2004).

ISSUES

Did the Respondent perform unworkmanlike home improvement, and/or fail to complete a home improvement; if so, what is the appropriate regulatory action; and did the Claimants sustain an actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the MHIC:

- MHIC Ex. # 1 - Notice of Hearing, dated May 3, 2007, with certified mail receipt attached
- MHIC Ex. # 2 - Denial of Postponement Request, dated October 11, 2007
- MHIC Ex. # 3 - Statement of Charges and Order for Hearing, dated March 23, 2007
- MHIC Ex. # 4 - Licensing Data, dated October 16, 2007
- MHIC Ex. # 5 - Construction drawings, dated May 16, 2005
- MHIC Ex. # 6 - Contract between the Respondent and the Claimants, dated June 15, 2005
- MHIC Ex. # 7 - Cancelled checks, various dates
- MHIC Ex. # 8 - Emails between the Claimants and the Respondent, various dates
- MHIC Ex. # 9 - Emails between the Claimants and the Respondent regarding kitchen cabinets and trim, various dates
- MHIC Ex. # 10 - Complaint, dated April 2, 2006
- MHIC Ex. # 11 - Letter from the Claimants to the Respondent, dated April 2, 2006
- MHIC Ex. # 12 - Photographs
- MHIC Ex. # 13 - Report of John J. Heyn, dated August 31, 2006

I admitted the following exhibits on behalf of the Claimants:

- Cl. Ex. # 1 - Estimates from 84 Lumber, dated June 22, 2006; Citi credit card statements, closing dates September 26, 2006 and November 27, 2006; cancelled check, dated October 10, 2006
- Cl. Ex. # 2 - Contract between Lutzio Construction and the Claimants, dated September 6, 2006, with cancelled checks, various dates.
- Cl. Ex. # 3 - Inspection Report from Annapolis Exteriors, dated February 23, 2006
- Cl. Ex. # 4 - Letter from the Claimants to the Respondent, dated August 2, 2005
- Cl. Ex. # 5 - Photographs
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- Cl. Ex. #13 - Manufacturer's literature regarding shingle installation, undated
- Cl. Ex. #14 - Photographs of trim, undated
- Cl. Ex. #15 - Wall Cabinet Pricing List, undated
- Cl. Ex. #16 - Marvin Windows Pricing List, undated
- Cl. Ex. #17 - Document titled "Linden MHIC Claim Figures," undated

I admitted the following exhibit on behalf of the Fund:

- Fund Ex. # 1 - Letter from HIC to the Respondent, with attachments, dated July 11, 2006

No documents were offered on behalf of the Respondent.

Testimony

The Claimant Andrew Linden testified on behalf of the MHIC and on his own behalf. The MHIC also presented the testimony of John J. Heyn, who was admitted as an expert in home improvement and home inspection. No other testimony was presented.

FINDINGS OF FACT

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

1. On or about June 15, 2005, the Claimants and the Respondent entered into a contract (Contract) for home improvements to the Claimants' residence at 97 Tarragon Lane, Edgewater, Maryland.
2. The Contract provided that the Respondent would perform extensive home improvements, including the construction of an addition at the rear of the house, a new roof, new siding, window replacements, paving work, and extensive kitchen remodeling.
3. The Contract price was \$128,100.00.
4. On June 22, 2005, the parties entered into a change order for an upgrade to the HVAC system. The amount of the change order was \$6,937.00.
5. The total amount of the Contract, including the change order, was \$135,037.00.
6. The Claimants paid the Respondent, by check, a total of \$123,370.45, under the Contract.
7. The Claimants made two additional payments, totaling \$1,517.00, directly to sub-contractors for work performed under the Contract, i.e., \$375.00 for dumpster services, and \$1,142.00 for a well booster pump.
8. The total amount paid by the Claimants to, or on behalf of, the Contractor was \$124,887.45.
9. The Respondent began work under the Contract on June 22, 2005.

10. The Contract provided that work was to be completed within 15 weeks.
11. As problems with the Respondent's performance under the Contract became apparent, the Claimants made numerous attempts to contact and work with the Respondent to reach a resolution. These efforts were generally unsuccessful.
12. The last date work was performed under the contract was January 12, 2006. Despite numerous problems with the construction, the Respondent refused to return after that date to complete repairs and other work called for under the contract.
13. On April 2, 2006, the Claimants sent the Respondent written notice stating that it considered the Respondent in default on the Contract.
14. Subsequent to the April 2, 2006 letter, the Respondent offered to come to the Claimants' house and perform repairs. He never appeared.
15. Roofing shingles used for the new roof were asphalt shingles manufactured by GAF Corporation. The shingles must be installed according to the manufacturer's instructions, including the proper placement of nails. If nails are placed too high ("high nailing") on the shingles, the manufacturer's warranty is voided and the shingles may be damaged in high winds and subject to leaking.
16. Subsequent to the installation of the roof, it began to leak.
17. On or about February 23, 2006, a certified GAF installer, Annapolis Exteriors, inspected the roofing on behalf of the Claimants.
18. The Respondent installed the shingles improperly, consistently high nailing the shingles.
19. The shingles must be completely replaced.
20. The cost of performing roof repairs is \$10,623.00

21. On August 12, 2006, the property was inspected by John J. Heyn, a home inspector retained by the Commission. Heyn produced a written report of his findings, dated August 31, 2006.
22. The roof decking in the attic was not cut to allow air to vent out of the new ridge vent on the main roof.
23. The exterior siding was not cut back along the roof shingles to prevent water from seeping behind the siding.
24. A downspout connection and rain gutter connection were installed improperly and may cause rainwater to back up.
25. Kickboards, trim, molding, and cabinetry in the kitchen and elsewhere were installed improperly or damaged or otherwise defective.
26. Paving stones in the front walkway were improperly installed.
27. Sheetrock and the gas line for the stove were improperly installed.
28. Windows and window sills were improperly installed, or damaged, and contain uneven carpentry work.
29. Following the Respondent's abandonment of the project, the Claimants contracted with Lutzio Construction Company (Lutzio) on September 6, 2006, to make repairs for all work which was performed, or should have been performed under the Contract, other than roofing repairs.
30. Lutzio completed the work on or about December 18, 2006.
31. The Claimants paid Lutzio \$3,700.00 for the repair work performed.
32. Following the Respondent's abandonment of the project, the Complainants purchased replacement cabinetry and window materials which were required as a result of the

Respondent's poor workmanship. The Claimants paid a total of \$7,015.00 for these materials.

33. As of the date of the hearing in this case, the Claimants have not hired a contractor to correct the roofing problems resulting from the Respondent's poor workmanship.

DISCUSSION

Regulatory Charges

The Respondent was charged with violating Md. Code Ann., Bus. Reg. § 8-311(a)(10), performing unworkmanlike and incomplete home improvement work.

The contract in this case, entered into on June 15, 2005, involved the construction of an addition and extensive renovations, including new windows and siding, and extensive reconstruction and remodeling of the kitchen.

Both Claimant Andrew Linden and John J. Heyn, a home inspector admitted as an expert, testified credibly that the Respondent's work was both unworkmanlike and incomplete. Although the Respondent completed the addition and did extensive remodeling work, much of the construction was inferior or incompetent, requiring major repairs and corrections after the fact. For example, a major component of the job was providing a new roof for the entire structure. The Respondent's workers disregarded the installation instructions for the shingles which were printed in multiple languages on the shingle packaging. By high nailing the shingles, the Respondent voided the warranty and made the roof susceptible to high winds and leakage. Indeed, the Claimant testified credibly that the roof has begun to leak. Additionally, much of the interior construction and remodeling was done so poorly that it resulted in damage to various fixtures being installed, such as cabinets and window frames and sills. The cost of

such repairs is based both on the payments to Lutzio, the contractor who completed the non-roofing repairs, and the expenses paid by the Claimants to purchase replacement cabinetry and window hardware.

Civil Penalty

The MHIC requested that the Respondent be subjected to a civil penalty of \$4,000.00. The civil penalty provision, Md. Code Ann., Bus. Reg. § 8-620(a) (2004), specifies that it is applicable to any person, whether or not the person is licensed by the MHIC, if that person violates a provision of the MHIC law. The Respondent has violated Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2004) for incomplete and unworkmanlike work, and thus is subject to a civil penalty not to exceed \$5,000.00 for each violation. Md. Code Ann., Bus. Reg. § 8-620(a) (2004).

In setting the amount of a civil penalty, the following factors are to be considered: the seriousness of the violation, the good faith of the violator, any previous violations, the harmful effect of the violation on the complainant, the public, and the business of home improvement, the assets of the violator, and any other relevant factors. Md. Code Ann., Bus. Reg. § 8-620(b) (2004).

In this case, the violations were serious, particularly the Respondent's partial abandonment of the job regarding the kitchen cabinetry and trim. By refusing to complete the job and by misleading the Claimants as to his intention to return to complete the job, the Respondent showed a lack of good faith. The violation had a detrimental effect on the Claimants, who were left with a partially-completed home improvement project, including a largely unusable kitchen. I also find that incomplete and substandard work such as performed by the Respondent here is damaging to the reputation and business of the home improvement industry as a whole.

No evidence was presented as to the Respondent's previous history of violations, if any, or as to his assets. Therefore, I cannot consider these factors.

The Respondent, who did not appear at hearing, did not offer any testimony or other evidence in mitigation of these conclusions.

Based on these factors, I find that the Commission's recommended civil penalty of \$4,000.00 is reasonable.

Licensure Action

The Respondent is currently licensed by the MHIC. Ex. # 4. Under Md. Code Ann., Bus. Reg. § 8-311(a)(11)(2004), the MHIC may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee violates a provision of the MHIC law. The MHIC has proposed a suspension of seven days. The Respondent's violations in this case were substantial, requiring a complete replacement of the roof and the hiring of a new contractor to finish the kitchen work abandoned by the Respondent. Given the seriousness of the Respondent's violations, I find that the Commission's recommendation of a seven day suspension is appropriate.

Guaranty Fund

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) (2004). 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). The Fund "may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2).

The costs to repair or replace the results of the Respondent's poor workmanship were unrefuted and were either based on Mr. Heyn's calculations or accepted by him as reasonable.¹ I found Heyn's testimony to be based on a careful inspection, and I found that his opinion was supported by a detailed explanation of his reasoning, as well as documentary evidence, including photographs. I accept Heyn's opinion as credible and I conclude that the Respondent performed unworkmanlike home improvement work. I also find that the Claimants gave the Respondent repeated and ample opportunities to correct his work, and that he failed to do so.

Accordingly, under COMAR 09.08.03.03B(3)(c) the Claimants' actual loss is measured as follows:

If the contractor did work according to the contract and the claimant has solicited ... 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 measurements accordingly.

Calculations

Therefore, in order to determine the amount of actual loss the following calculations must be performed²:

¹ For example, Heyn testified that he could not verify the nailing conditions of the shingles because, at the time of his inspection, the shingles were "sealed down tightly on their seal strips" and to "raise a shingle now would tear or damage it." HIC Ex. 13. Nevertheless, he did not dispute that "high nailing" would require replacement of all shingles and that the estimate from Annapolis Exteriors was reasonable.

² The Claimants also made claims for damage to an outdoor grill and hardwood floors allegedly caused by the Respondent's employees, as well as for items allegedly stolen by the Respondent's employees. The Fund argues, and I agree, that such claims are for "consequential damages" and thus barred under Md. Code Ann., Bus. Reg. § 8-405(c)(3) (2004).

• Amount paid to the Respondent under the original contract and change order:	\$123,370.45
• Amount paid on behalf of Respondent for dumpster:	\$ 375.00
• Amount paid on behalf of Respondent for well booster pump:	\$ 1,142.00
Total amount paid to or on behalf of Respondent	\$124,887.45
Add amount paid or to be paid to repair Respondent's work:	
• Payment to 84 Lumber for materials:	\$ 7,015.35
• Payment to Lutzio Contracting for kitchen work	\$ 3,700.00
• Estimate from Annapolis Exteriors for roof repair	\$ 10,623.00
• Add amount paid to complete work under original contract:	\$ 21,338.35
• Total	\$146,225.80
• Subtract original contract price	\$135,037.00
• Amount of actual loss	\$11,188.80

Based on the above calculations, I find that the Claimants' actual loss is \$11,188.80. The statute limits Fund recovery to \$15,000.00 for the acts or omissions of one contractor. Md. Code Ann., Bus. Reg. § 8-405(c)(1) (2004). The amount of the Claimants' actual loss is less than \$15,000.00; therefore, the Claimants are entitled to the full amount of their actual loss.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Respondent performed unworkmanlike home improvement, and he failed to complete a home improvement in violation of Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2004). I further conclude that the Respondent is subject to sanction under Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2004) and civil penalties under Md. Code Ann., Bus. Reg. § 8-620 (2004). I also conclude that, under Md. Code Ann., Bus. Reg. § 8-401 (2004), the Claimants have sustained an actual loss of \$11,188.80 as a result of the Respondent's acts and omissions and is entitled to recover that amount from the Fund under Md. Code Ann., Bus. Reg. § 8-405(c)(1) (2004).

PROPOSED ORDER

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

ORDER that the Respondent violated Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2004);
and

ORDER that the Respondent be fined \$4,000.00, pursuant to Md. Bus. Reg. Code Ann. § 8-620 (2004) and that the Respondent pay the amount of this fine to the Maryland Home Improvement Commission within thirty days of the adoption of this Proposed Order by the Commission; and


ORDER that the Respondent's license issued by the Maryland Home Improvement Commission be suspended for seven days; and

ORDER that the Claimants be awarded \$11,188.80 from the Maryland Home Improvement Guaranty Fund; and

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 (10%) as set by the 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.

January 15, 2008
Date Decision Mailed


David Holstetter
Administrative Law Judge

DH
94178

THE MARYLAND HOME
IMPROVEMENT COMMISSION

v.

DAVID B. BARKLEY,
t/a OMEGA CONSTRUCTION 7
REMODELING,

RESPONDENT

AND THE CLAIM OF

ANDREW AND PAGE LINDEN,

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AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR ALLEGED VIOLATIONS OF
DANIEL KAMINKOW, t/a DAN'S
HOME IMPROVEMENTS, INC.

* * * * *

* BEFORE DAVID HOFSTETTER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

* OAH NO.: DLR-HIC-04-07-12125

* MHIC NO.: 06 (90) 2368

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FILE EXHIBIT LIST

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- Cl. Ex. #15 - Wall Cabinet Pricing List, undated
- Cl. Ex. #16 - Marvin Windows Pricing List, undated
- Cl. Ex. #17 - Document titled "Linden MHIC Claim Figures," undated

I admitted the following exhibit on behalf of the Fund:

- Fund Ex. # 1 - Letter from HIC to the Respondent, with attachments, dated July 11, 2006

No documents were offered on behalf of the Respondent.

PROPOSED ORDER

WHEREFORE, this 28th day of February 2008, 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.

George Rose

*George Rose
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION