

IN THE MATTER OF THE CLAIM
OF KAI NORRIS C. NG,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOE SLAGHT,
T/A J. A. SLAGHT CONTRACTING,
RESPONDENT

* BEFORE KATHLEEN A. CHAPMAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-HIC-02-12-26970
* MHIC NO.: 10 (05) 763
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On August 5, 2010, Kai Norris C. NG (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$6,050.00 for actual losses allegedly suffered as a result of a home improvement contract with Joseph Slaght, trading as J. A. Slaght Contracting (Respondent). The Claimant amended his claim on February 16, 2011, increasing the amount of the reimbursement request to \$9,074.00.

I held a hearing on January 9, 2013, at the Frederick County Department of Social Services, 100 All Saints Street, Room 2C, Frederick, Maryland 21701. Md. Code Ann., Bus.

Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. Howard Walsh, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings (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; 09.08.02; 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 marked exhibits on the Claimant's behalf:

- C-1 Proposal from the Respondent, March 6, 2009
- C-2 Notice of Violation, The City of Frederick Building Department, April 27, 2009
- C-3 Copies of cancelled checks
- C-4 Carpet estimate from Jenke Contracting, Inc., January 21, 2011
- C-5 Repair and reconstruction estimate from Brice Enterprises, January 21, 2011
- C-6 Five color photocopies of the basement
- C-7 Home Improvement Claim Form, August 5, 2010

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

- GF-1 Notice of Hearing, August 28, 2012; signed green cards (certified mailing) for both the Claimant and Respondent
- GF-2 Transmittal, undated; Hearing Order, June 12, 2012; Amended Claim, February 16, 2011; and Home Improvement Claim Form, August 5, 2010
- GF-3 Licensing history for the Respondent, December 12, 2012
- GF-4 Letter from John Borz, Chairman, MHIC, enclosing the Home Improvement Claim Form, August 5, 2010
- GF-5 Amended Claim, February 16, 2011
- GF-6 Change Orders, April 7, 2009 and June 4, 2009
- GF-7 Licensing history for Brice Enterprises, December 19, 2012
- GF-8 Licensing history for Jenke Contracting, Inc., December 19, 2012

I admitted the following marked exhibit on the Respondent's behalf:

- R-1 Complaint Form, received on December 9, 2009

Testimony

The Claimant and the Respondent testified.

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 01-90773.
2. On March 6, 2009, the Respondent entered into a contract with the Claimant to build¹ a finished basement at the Claimant's home consisting of a great room, a bedroom (also referred to as an exercise room), a closet (in the bedroom), a laundry room, a bathroom,

¹ The contract included framing, drywall, rough-ins, wiring, plumbing, painting, trim and carpet/tile, as well as the installation of various hardware and bathroom fixtures.

a foyer, and stairs and landing.² The contract did not specify a start date for when the work would begin; instead, it included a completion date of no later than September 30, 2009 for when the work would be finished.

3. Afterwards, the Respondent hired sub-contractors to perform the electrical (Burriss Electric), plumbing (Confer's Plumbing and Heating) and painting (unnamed) under the terms of the contract.

4. The original agreed upon contract price was \$25,000.00 to be paid on the following schedule:

Due upon acceptance:	\$7,000.00
Due upon completion of framing:	\$5,000.00
Due upon completion of rough-ins:	\$3,000.00
Due upon completion of drywall:	\$3,000.00
Due upon completion of trim and paint:	\$3,000.00
Due upon completion of job:	<u>\$4,000.00</u>
TOTAL:	\$25,000.00

(C-1.)

5. The Claimant paid the initial deposit in two installments on March 16 and March 20, 2009 and the Respondent began working at the Claimant's home soon thereafter.

6. By April 6, 2009, the Respondent completed the framing for the basement and the Claimant paid him for that work.

7. On April 7, 2009, the Respondent agreed to install a cable jack in the kitchen and a dome light switch in a bedroom closet. (GF-6.) The two additions resulted in a change order in the amount of \$350.00. *Id.*

² The contract also included work in the Claimant's kitchen, but this aspect of the work is not the subject matter of this dispute.

8. On April 13, 2009, the Respondent agreed to work on a bathroom floor in the Claimant's townhome but did not draft a change order describing the work to be performed. (CL-3.) The amount for this change was \$385.00.

9. By April 15, 2009, the Respondent completed the rough-ins and drywall in the basement and the Claimant paid him for this work.

10. At some point in April 2009, The City of Frederick Building Department (City) learned that it did not have any building permits on file for the work being performed at the Claimant's home. (C-2.)

11. As a result, on April 27, 2009, the City issued a Notice of Violation to the Claimant wherein it instructed him to cease all work on his home, or risk a fine, until such time as he obtained the necessary building permits. (C-2.)

12. The Respondent is not allowed to delegate the responsibility of obtaining building permits to the homeowner.

13. The Respondent did not include the cost to secure the necessary permits to perform the terms and conditions of the contract in the contract price. The cost of the permits equaled \$1,362.00, bringing the total cost of the contract to \$26,362.00.

14. Building permits were subsequently obtained for the electrician, the plumber and the Respondent on May 7, 2009, May 28, 2009, and May 7, 2009, respectively.

15. The Respondent continued to work on the project after May 2009.

16. On June 4, 2009, the parties entered into another change order wherein the Respondent agreed to finish the area underneath the basement stairs, to include: framing, electrical, drywall, paint, trim and carpet. (GF-6.) This addition cost \$500.00. *Id.*

17. With the aforementioned changes, the total amount owed under the contract came to \$27,597.00.

18. By August 26, 2009, the Claimant paid the Respondent for the painting and trim in the basement. .

19. Furthermore, on this date, the Respondent asked the Claimant to agree to a change in the contract terms to allow extra time to complete the work, extending the completion date from September 30, 2009 to November 15, 2009. The Claimant agreed to the change and, in exchange for the modification, the Respondent agreed to deduct \$500.00 from the contract price.

20. With the aforementioned change, the total amount owed under the contract came to \$27,097.00, as follows:

Date:	Description:	Amount:
March 6, 2009	Payment due upon acceptance	\$ 7,000.00
April 6, 2009	Payment following completion of framing	\$ 5,000.00
April 7, 2009	Change order	\$ 350.00
April 13, 2009	Change order	\$ 385.00
April 15, 2009	Payment following completion of rough-ins	\$ 3,000.00
April 15, 2009	Payment following completion of drywall	\$ 3,000.00
May 7, 2009	Permit	\$ 600.00
May 7, 2009	Permit	\$ 262.00
May 28, 2009	Permit	\$ 500.00
June 4, 2009	Change order	\$ 500.00
August 26, 2009	Payment following completion of trim and paint	\$ 3,000.00
October 29, 2009	Payment upon completion of the contract	\$ 3,500.00 ³
	Total:	\$27,097.00

³ Originally, the final payment upon completion of the project was \$4,000.00, but with the modification to the contract (see Findings of Fact No. 19) the amount was changed to \$3,500.00.

21. The Respondent intermittently worked on the project from August 2009 until October 23, 2009 when he walked off the project due to a dispute between himself, the Claimant, and the Claimant's wife regarding change orders for upgrades not contemplated by the contract. The Respondent, however, did not submit a letter in writing to the Claimant to explain himself or confirm that there was a mutual understanding between the two to cancel the contract as fully performed up to that point.

22. The Claimant, on the other hand, fully expected the Respondent to finish the project and, after October 2009, the Claimant called the Respondent several times hoping to speak to him personally but his calls were never returned.

23. By October 23, 2009, the Claimant had paid \$23,597.00 to the Respondent, as indicated below:

Date	Description	Amount
March 16, 2009	Initial payment	\$ 2,000.00
March 20, 2009	Initial payment	\$ 5,000.00
April 6, 2009	Payment following completion of framing	\$ 5,000.00
April 7, 2009	Change order	\$ 350.00
April 13, 2009	Change order	\$ 385.00
April 15, 2009	Payment following completion of rough-ins	\$ 3,000.00
April 15, 2009	Payment following completion of drywall	\$ 3,000.00
May 7, 2009	Permit	\$ 600.00
May 7, 2009	Permit	\$ 262.00
May 28, 2009	Permit	\$ 500.00
June 4, 2009	Change order	\$ 500.00
August 26, 2009	Payment following completion of trim and paint	\$ 3,000.00
	Total:	\$23,597.00

24. When the Respondent stopped work on the project, there were several outstanding items needing to be done, including:

- a. Carpet (great room, bedroom, stairs and landing);
- b. Foyer (tile/stone sealer and grout);
- c. Exercise room (install ceramic tile, tile sealer and grout);
- d. Laundry room (install dryer vent, hose, wash basin or laundry tub, shelving and ceramic tile (seal and grout));
- e. Bathroom (set vanity, toilet, sink, and faucet; install ceramic tile, tile sealer and grout; and baseboard);⁴ and
- f. Miscellaneous items:
 - i. Hardware (door knobs and door stops);
 - ii. Lighting (switch, outlet and cable jack covers; thermostat; supply and install light rings and bulbs);
 - iii. Touch-ups.

25. The Claimant initially filed a complaint with the MHIC on December 9, 2009, but later withdrew it when it was discovered that the documentation in support of his claim was provided by an unlicensed contractor. (*See R-1.*)

26. The Claimant re-filed his claim on August 5, 2010, seeking reimbursement in the amount of \$6,050.00.

27. The Claimant amended his claim on February 16, 2011, increasing the amount of the reimbursement request to \$9,074.00 after obtaining one proposal each from Jenke Contracting, Inc., (Jenke)⁵ and Brice Enterprises (Brice),⁶ as follows:

a. On January 21, 2001, the Claimant obtained a proposal from Jenke to provide and install 1,478.68 square feet of Berber carpet and premium grade padding in the basement (great room, bedroom, stairs and landing). (C-4.) The proposal price was \$5,949.04.

Id.

b. On January 24, 2011, the Claimant obtained a proposal from Brice to (a) re-paint the entire basement, including the great room, laundry room, stairway, landing, bedroom

⁴ A very small section of the baseboard is missing in the bathroom.

⁵ MHIC license number 01-83344. (GF-8.)

⁶ MHIC license number 01-40956. (GF-7.)

and bathroom; (b) perform 12 hours of general labor on the drywall; (c) complete a concrete patch; (d) detach and reset all baseboards; (e) install, seal and grout ceramic tile; (f) purchase and install door knobs and door stops; (g) build a new closet; (h) set vanity, sink, faucet and laundry tub; and (i) supply and install light rings and bulbs. (C-5.) The proposal price was \$6,625.26.

Id.

28. The unit cost for the carpet, padding and tacking (metal transition strip) contained in the Jenke proposal exceeded the amount originally contracted for with the Respondent. The Respondent included an allowance of \$2.75 to \$3.00 per square foot in the contract. (C-1.) At \$3.00 per square foot, the actual loss for the carpet is \$4,436.04.

29. The Brice proposal contained work that was not (a) originally found in the original contract (building a new closet and the installation of high grade ceramic in the laundry room) and (b) unnecessary (paint, drywall and baseboards).

30. The following work is necessary to finish the original terms of the Respondent's contract:

Room	Description	Amount
Basement foyer	Tile/stone sealer	\$ 23.36
Basement foyer	RegROUT tile	\$ 80.64
Bathroom	Detach and reset baseboard	\$ 36.10
Bathroom	Install ceramic tile	\$ 345.00
Bathroom	Tile/stone sealer	\$ 26.29
Bathroom	RegROUT tile	\$ 90.77
Laundry room	Install ceramic tile	\$ 345.00
Laundry room	Tile/stone sealer	\$ 25.43
Laundry room	RegROUT tile	\$ 87.77
Laundry room	Concrete patch/small repair	\$ 45.33
Miscellaneous	Purchase/install door knobs and door stops	\$ 443.20
Plumbing	Set vanity, toilet, sink, and faucet in the bathroom and set the tub in the laundry room	\$1,000.00
Electrical	Supply and install light rings and	\$ 300.00

	bulbs	
	Total:	\$2,848.89

31. The Claimant's actual loss is \$3,724.93.

DISCUSSION

I. Position of the parties

A. Claimant

The Claimant contends that the Respondent not only failed to perform all aspects of the home improvement contract, but some of the work performed was unworkmanlike.

In support of his claim, the Claimant first expressed dissatisfaction with the Respondent's work ethic. Specifically, the Claimant commented that the Respondent had a tendency to disappear and not show up for long periods of time when he was supposed to be working on his home. Complicating matters, the Claimant stated that the City instructed him to cease all work on the project until such time he obtained the necessary building permits. The Claimant testified that the Respondent was unapologetic for his actions and told him to "not worry about it."

For reasons unclear to the Claimant, the Respondent later abandoned the project on October 23, 2009. According to the Claimant, this occurred approximately two months after he paid the Respondent \$3,500.00 for material and agreed to an extension of the completion date from September 30, 2009 to November 15, 2009. The Claimant testified that when the Respondent failed to finish by the date agreed upon, he began calling the Respondent several times without reaching him.

In addition, the Claimant testified that after the Respondent walked off the project, he noticed several items were left incomplete. Specifically, the Claimant indicated that the Respondent failed to: (1) provide and install the carpet, (2) install, seal and/or regrout ceramic

tiles, (3) install miscellaneous plumbing and electrical items, and (4) furnish and install door knobs and door stops. In support of his claim, the Claimant submitted into evidence photocopies of pictures he believed best described the present state of the basement at the time the Respondent walked off the project. (See C-6a, b, c, d.) He also submitted into evidence the Brice and Jenke proposals showing all the work he claims was required to be done to complete the original contract terms. (C-4, C-5.)

The Claimant likewise argued that the finished product was done in an unworkmanlike manner. Specifically, the Claimant claimed that the surface of the newly installed drywall was uneven and blemished with unsightly spots which he believed was due to uneven application of paint. The Claimant testified that John Brice, the contractor who supplied him with a repair proposal, told him it was necessary to remove and replace the drywall in order to fix both problems. The Claimant also cited issues with dark spots appearing on the ceiling, which he later learned from Mr. Brice to be mold. According to the Claimant, Mr. Brice told him that this problem was caused by (1) bad paint or (2) improper muddying (sic). In either event, the Claimant stated that it is necessary to repaint the entire basement due to both the drywall situation and the mold. In support of his claim, the Claimant submitted into evidence photocopies of pictures he took showing the dark spots on the ceiling, the paint job on the walls and the Brice proposal. (See C-6b, e; C-5.)

The Claimant contended as well that Mr. Steve Muir, an estimator with Jenke, told him that it was necessary to remove and replace the baseboard in the basement in order to lay the carpet. According to the Claimant, Mr. Muir told him that the Respondent failed to provide enough clearance from the floor to the bottom of the baseboard to install the carpet. In support of his claim, the Claimant submitted into evidence the Jenke proposal. (C-4.)

B. Respondent

The Respondent, on the other hand, testified that initially everything seemed fine with the project until about ¾ of way through when the Claimant's wife began yelling at him and being disrespectful. At or about this same time, according to the Respondent, the Claimant also demanded more items or upgrades for which he had not paid. At that point, the Respondent felt it was necessary to part ways with the Claimant and call the work performed and monies paid to be even. While he acknowledged that he did not write a letter to the Claimant to confirm this arrangement, the Respondent, nevertheless, thought that he was off the hook for completing the rest of the contract. In fact, the Respondent testified that he felt "pretty certain I was paid for work completed."

Addressing the specifics of the claim, the Respondent agreed with the Claimant to a certain degree that many aspects of the contract were left undone, such as the (1) tile (install, seal and regrout), (2) carpet (supply and install), (3) handrail (sand and stain) (4) washer/dryer (hook-ups), (5) miscellaneous plumbing and electrical items (install), (6) door knobs and door stops (furnish and install), and (7) baseboard (provide and install a small piece).

Conversely, the Respondent disagreed with the Claimant that he improperly installed the baseboards – he was adamant that he allowed 3/8" inch clearance from the floor to the bottom of the baseboard to permit room for the carpet to be installed.

II. Legal Framework

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

III. Analysis

A. Was the Respondent licensed at the time of the contract?

A review of the licensure information for the Respondent (GF-7) makes it clear that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

B. Did the Claimant sustain an actual loss?

i. Carpet

Both parties agree that the home improvement contract, identified in Findings of Fact No. 2, included the cost of material and installation of carpet. In addition, both parties agree that the Respondent did not honor this aspect of the contract prior to abandoning the project. There is also no dispute that the Respondent included an allowance of \$2.75 to \$3.00 per square foot in the home improvement contract to cover the cost of the carpet. Unfortunately, the Respondent failed to include in his contract the square footage to be carpeted. While it is true that the Respondent testified that the area to be carpeted was 1200 square feet, his recollection was only based on a memory about a two year old contract. The Claimant, on the other hand, presented a proposal from Jenke that cited the area to be covered by carpet to be 1,478.68 square feet. Without any documentation to corroborate the Respondent’s memory of the square footage, I find it appropriate to apply the Jenke square footage and multiply it by \$3.00 per square foot as a basis for determining the actual loss due to the carpet. Therefore, the actual loss for this aspect

of the claim is \$4,436.04.⁷

ii. Portions of the Brice estimate

Other aspects of the contract were left undone too. Specifically, the Respondent failed to install the tile, washer/dryer hook-ups, miscellaneous plumbing and electrical items, door knobs and door stops, and a small piece of baseboard in the bathroom. (See Findings of Fact No. 24.)

As for the amount owed for performing this work, I am not persuaded by the Respondent's testimony that the amount owed to the Claimant is \$700.00. The Respondent based this figure on the amount he would charge a homeowner should he perform the work himself. Yet, on cross-examination by the Fund, the Respondent acknowledged that the price to perform the work by a different contractor may be more because it is typical in the industry to charge a premium when following in the footsteps of a contractor who is believed to have not fully completed the terms and conditions of a contract. This is largely due to the fact that the new contractor may find or uncover additional items needing to be done that were unbeknownst to him or her when preparing a proposal. As such, I find it appropriate to apply the figures found in the Brice proposal for completing the outstanding items. Therefore, as detailed in Findings of Fact No. 30, I find the actual loss for this aspect of the claim to be \$2,848.89.

iii. Drywall, paint and baseboards

The balance of the Claimant's concerns involves the paint, drywall and the majority of

⁷ Section 8-101(g) of the Bus. Reg. Article (definition of a home improvement), references an Attorney General opinion on the issue of carpet installation, which reads as follows:

CARPET INSTALLATION. -- The installation of wall-to-wall carpeting is not included within the definition of "home improvement" in this section, and is thus outside the purview of the regulatory jurisdiction of the Home Improvement Commission. 66 Op. Att'y Gen. 151 (1981).

Since the cost for supplying the carpet, contained in both the Respondent's contract and the Jenke proposal, did not delineate between supply and installation, I did not exclude this aspect of the Claimant's Fund claim.

the baseboards. The Claimant testified that he was dissatisfied with the Respondent's work. Specifically, the Claimant argued that mold was now growing on the basement ceiling (*see* C-6e) and that it was due to the poor quality paint used by the Respondent or, alternatively, improper prepping. In addition, the Claimant claimed that the drywall in the great room was improperly installed causing an uneven surface; thereby necessitating the removal and replacement of the drywall. This, too, was compounded by the fact that the paint was unevenly applied, requiring re-painting of the entire basement. As for the baseboards, the Claimant claimed that they, too, were improperly installed.

Even though proceedings before the OAH are more informal than those occurring in a constitutional court, there are still standards of proof that must be met. The issue in this case is whether the work performed by a home improvement contractor was "unworkmanlike, inadequate, or incomplete...." Md. Code Ann., Bus. Reg. § 8-401 (2010). Adequate proof is still required. The Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR 09.08.03.03A(3). The burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009 & Supp. 2012).

"Workmanlike" is defined as "characterized by the skill and efficiency typical of a good workman." *Merriam-Webster's Collegiate Dictionary* 1443 (11th ed. 2006); *see also Webster's II New Riverside University Dictionary* 1328 (1994) ("Typical of or befitting a skilled workman or craftsman.") "Inadequate" means "not adequate." *Merriam-Webster's* at 627. "Adequate" means "sufficient for a specific requirement." *Merriam-Webster's* at 15; *see also Webster's New Riverside University Dictionary* at 78 ("Able to satisfy a requirement.") "Incomplete" means "not complete" or "unfinished." *Merriam-Webster's* at 630. "Complete" means "having all the necessary parts, elements, or steps." *Merriam-Webster's* at 254.

Although the Claimant presented estimates from two home improvement contractors to address purported deficiencies in the Respondent's work as it pertains to the paint, drywall and baseboards, there was absolutely no probative expert testimony presented to show that the Respondent's work was not performed with the "skill and efficiency typical of a good workman," or that it was not "typical of or befitting a skilled workman or craftsman." The Claimant also did not present any credible evidence to show that the work performed by the Respondent was insufficient for a particular purpose. Likewise, the Claimant failed to establish that there were necessary parts, elements, or steps missing from the final product.

The evidence instead supports a finding that the work performed by the Respondent was not to the Claimant's satisfaction, but the Claimant is not a home improvement expert who is able to render an opinion based on his expertise in the field of home improvement. Questions of adequacy of the work require expertise because it involves the comparison of the work performed against an industry standard. The Claimant – the only witness presented – was not qualified as an expert and could, therefore, not render such an opinion. The Claimant's testimony represented his own opinion, such as the assertion that the Respondent did not install the drywall, paint or baseboard in a workmanlike manner.

Moreover, the Claimant presented no credible photographic evidence to support his conclusions that would assist me, as the trier of fact, to make a determination on my own regarding his assertions about the drywall, paint and baseboards. The photocopies of pictures entered into evidence were poor in quality and showed splotches of white (C-6c) that the Claimant begrudgingly acknowledged had nothing to do with the Respondent's performance under the contract. The white splotches were due instead to print processing. Furthermore, even after I carefully examined the pictures, I could not detect the unevenness in the paint or drywall

that the Claimant claimed was evident in the pictures. That said, I do agree with the Claimant that a small portion of the baseboard was missing in the bathroom and needed to be fixed. (See C6-e.)

As mentioned above, while hearsay evidence may be admissible in administrative hearings, without more, I cannot consider the Brice and Jenke proposals as proof of unworkmanlike, inadequate or incomplete home improvements. Although they have estimated the cost of repairs, there is no proof that the work that they intended to perform was the result of the Respondent's unworkmanlike, inadequate or incomplete home improvement work.

According to section 10-213(b) of the State Government Article of the Maryland Annotated Code (2009 & Supp. 2012), the Administrative Procedures Act, "[t]he presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence" which might include hearsay, as that term is defined in the Maryland Rules:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

MD Rules, Rule 5-801(c). However, to conform to basic standards of fairness, there are other factors that must be considered before hearsay statements are admitted into evidence. *See, Travers v. Baltimore Police Dept.* 115 Md. App. 395 (1997) and *Kade v. Charles H. Hickey, Jr., Sch.*, 80 Md. App. 721 (1989). Those considerations extend to the lack of any statement in the Brice and Jenke proposals that addresses the quality of the Respondent's work. Furthermore, neither proposal provides a conclusion that the Respondent's work did not meet industry standards.

Therefore, I do not find the Respondent responsible for the cost of drywall, paint or 100% of the baseboards. As a result, I deducted \$3,041.69 from the Claimant's claim.

iv. New closet and installation of upgraded ceramic tile (per Brice contract)

On cross-examination by the Respondent, the Claimant stated that the new closet was additional work and, therefore, not included in the original estimate. As a result, the cost associated with the new closet, \$492.17, will not be considered for reimbursement by the Fund. Likewise, the Claimant unequivocally indicated during his testimony that he upgraded the type of tile to be installed in the laundry room under the Brice proposal. As such, I have deducted the special surcharge, in the amount of \$171.36, for the installation associated with the upgrade.

C. Was there a good faith effort to resolve the contract dispute?

Section 8-405(d) of the Business Regulation Article provides that "[t]he Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2012). I do not find that the Claimant rejected any good faith offers to resolve the claim in this case. The Respondent testified that it was his understanding that the parties agreed to part ways after a misunderstanding concerning change orders. The Respondent further stated that he had no intention of finishing the project after that point. For whatever reasons, the Claimant was unaware of the discord and fully expected the Respondent to return and finish/repair the work.

D. Award calculation

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).

In support of his Fund claim, the Claimant presented two proposals (Jenke and Brice) to complete the original terms of the contract. The carpet proposal from Jenke, in the amount of \$5,949.04, included an estimate for upgraded carpet and padding not envisioned in the Respondent's contract and it was more than the agreed upon price of \$2.75 to \$3.00 per square foot per the Respondent's contract. As noted above, I also found that the area to be carpeted is 1,478.68 square feet. Hence, the amount owed for the carpet is \$4,436.04 ($1,478.68 \times \$3.00 = \$4,436.04$). During closing remarks, the Fund also recommended this amount.

The Brice proposal, in the amount of \$6,625.26, included an estimate to perform work that was unnecessary to complete the original terms of the contract. As fully described above, I discounted from the price any reference to paint, baseboard (except for in the bathroom), drywall, upgraded ceramic tile and the new closet addition because the Claimant was unable to establish that the work performed by the Respondent was either incomplete or unworkmanlike, or part of the original contract with the Respondent. In fact, the Respondent testified that he knew some of the work outlined in the Brice proposal was for upgrades or new work. As such, I find that the amount owed for the repairs is only \$2,848.89.

Consequently, when I add the two figures together (\$4,436.04 + \$2,848.89), I find that the amount required to complete the work is \$7,284.93.

After considering the position taken by the Fund that an award in the amount of \$4,410.85⁸ is appropriate; I find that this figure encompasses work that I have determined did not meet the definition of actual loss. Specifically, the Fund included monies for baseboard and paint. By way of illustration, below is a chart of how the Fund arrived at its figure concerning the Brice proposal:

Room	Brice proposal	Fund recommendation
Main basement	Baseboard 292.10	Baseboard 292.10
	Drywall 341.16	Tile <u>104.00</u>
	Paint 1,338.36	Total ... \$ 396.10
	Tile <u>104.00</u>	
	Total ... \$2,075.62	
Bedroom	Baseboard 99.29	Baseboard 99.29
	Paint <u>394.95</u>	Paint <u>394.95</u>
	Total ... \$ 494.24	Total ... \$ 494.24
Stairs/Landing	Baseboard 56.08	Baseboard 56.08
	Paint <u>251.88</u>	Paint <u>251.88</u>
	Total ... \$ 307.96	Total ... \$ 307.96
Bathroom	Baseboard 36.10	Baseboard 36.10
	Paint 117.91	Tile <u>462.06</u>
	Tile <u>462.06</u>	Total ... \$ 498.17
	Total ... \$ 616.07	
Laundry room (I did not break down the tile figure, but it includes \$171.36 for the installation of high grade ceramic tile.)	Baseboard 35.15	Baseboard <u>35.15</u>
	Paint 114.81	Total ... \$ 35.15
	Concrete patch..... 45.33	
	Tile <u>629.56</u>	
	Total ... \$ 824.85	
Miscellaneous	Door knobs 36.20	Door knobs 336.20
	Door stops <u>107.00</u>	Door stops <u>107.00</u>
	Total ... \$ 443.20	Total ... \$ 443.20
New closet	Framing 99.89	-0-
	Drywall 117.60	

⁸ \$ 23,597.00	Amount the Claimant paid the Respondent
+ 7,910.19	Amount required to complete the work (\$4,436.04 (carpet) + \$3,474.81 (Brice proposal))
\$ 31,017.19	
- 27,097.00	Contract price
\$ 4,410.85	Claimant's actual loss

	Interior door unit ... 167.53 Closet shelf/rod 69.35 Paint <u>37.80</u> Total \$ 494.17	
Plumbing	Set vanity, sink, faucet and laundry tub ... \$1,000.00	Set vanity, sink, faucet and laundry tub ... \$1,000.00
Electrical	Supply/install light Rings; supply/install Bulbs \$ 600.00	Supply/install light Rings; supply/install Bulbs \$ 600.00
	TOTAL (w/o tax): \$5,254.11	TOTAL: \$3,474.81

As discussed, the Claimant failed to establish by a preponderance of the evidence that the paint and baseboard required removal and replacement due to unworkmanlike performance.

Consequently, COMAR 09.08.03.03B(3)(c) is the provision applicable here. Using the lowest estimate, I calculate the Claimant's actual loss as follows:

\$ 23,597.00	Amount the Claimant paid the Respondent
<u>+ 7,284.93</u>	Amount required to complete the work
\$ 30,881.93	
<u>- 27,097.00</u>	Contract price
\$ 3,724.93	Claimant's actual loss

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual compensable loss of \$3,724.93 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,724.93; 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(a) (2010); and

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

Signature on File

February 22, 2013
Date Decision Mailed

KAC/ch
139750

Kathleen A. Chapman
Administrative Law Judge

<p>IN THE MATTER OF THE CLAIM</p> <p>OF KAI NORRIS C. NG,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JOE SLAGHT,</p> <p>T/A J. A. SLAGHT CONTRACTING,</p> <p>RESPONDENT</p>	<p>* BEFORE KATHLEEN A. CHAPMAN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-12-26970</p> <p>* MHIC NO.: 10 (05) 763</p> <p>*</p> <p>*</p> <p>*</p>
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EXHIBITS LIST

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

- C-1 Proposal from the Respondent, March 6, 2009
- C-2 Notice of Violation, The City of Frederick Building Department, April 27, 2009
- C-3 Copies of cancelled checks
- C-4 Carpet estimate from Jenke Contracting, Inc., January 21, 2011
- C-5 Repair and reconstruction estimate from Brice Enterprises, January 21, 2011
- C-6 Five color photocopies of the basement
- C-7 Home Improvement Claim Form, August 5, 2010

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

- GF-1 Notice of Hearing, August 28, 2012; signed green cards (certified mailing) for both the Claimant and Respondent
- GF-2 Transmittal, undated; Hearing Order, June 12, 2012; Amended Claim, February 16, 2011;

and Home Improvement Claim Form, August 5, 2010

GF-3 Licensing history the Respondent, December 12, 2012

GF-4 Letter from John Borz, Chairman, MHIC, with enclosed Home Improvement Claim Form, August 5, 2010

GF-5 Amended Claim, February 16, 2011

GF-6 Change Orders, April 7, 2009 and June 4, 2009

GF-7 Licensing history for Brice Enterprises, December 19, 2012

GF-8 Licensing history for Jenke Contracting, Inc., December 19, 2012

I admitted the following marked exhibit on the Respondent's behalf:

R-1 Complaint Form, received on December 9, 2009

PROPOSED ORDER

WHEREFORE, this 2nd day of April 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.

Joseph Tunney

*Joseph Tunney
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION