



STATE OF MARYLAND
DLLR

DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

IN THE MATTER OF THE CLAIM
OF DAVID & ELEANOR MEYD
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR ALLEGED VIOLATIONS OF
LEO T. BARTNIK, JR.,
t/a VIET VET, INC.

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**MARYLAND HOME
IMPROVEMENT COMMISSION**

MHIC CASE NO. 06 (90) 623

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FINAL ORDER

WHEREFORE, this 7TH day of March, 2010, 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) Pursuant to COMAR 09.08.03.03B, the correct measure of the Claimants' actual loss is as follows:

● Amount paid to original contractor under contract (Findings of Fact 9, 11)	\$7,400.00
● Amount paid to repair (Finding of Fact 17)	<u>\$9,812.00</u>
	\$17,212.00
● Less original contract price (Finding of Fact 7)	- <u>\$7,900.00</u>
● Actual Loss	\$9,312.00

B) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

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C) The Administrative Law Judge found that the Claimants paid a total of \$7,400.00 Respondent. Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the Commission may not award more than \$7,400.00 to the Claimants.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimants are Awarded \$7,400.00 from the Home Improvement Guaranty Fund.

B) Pursuant to Business Regulation Article, §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall then be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall also be liable for 10% annual interest on any unreimbursed balance owed to the Fund.

4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney
Chair - Panel B
MARYLAND HOME IMPROVEMENT
COMMISSION

IN THE MATTER OF THE CLAIM OF	* BEFORE ROBERT F. BARRY,
DAVID AND ELEANOR MEYD	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED VIOLATIONS OF	* OAH NO.: DLR-HIC-02-08-46343
LEO THEODORE BARTNIK JR.,	* MHIC NO.: 06 (90) 623
MHIC REGISTRATION #01-6205	*

* * * * *

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 July 18, 2007, David and Eleanor Meyd (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses allegedly suffered as a result of the acts of Leo Theodore Bartnik Jr. (Respondent), a licensed home-improvement contractor.

I held a hearing on January 6, 2010 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(j) (2004 & Supp. 2009). Attorney I. William Chase represented the Claimants. The Respondent failed to appear after due notice to his address of record. Kris King, 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 (2009); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUE

Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondent's acts?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimants submitted fourteen exhibits that I admitted into evidence:

- CLAIM #1 - Agreement (Home Improvement Contract), between the Claimants and the Respondent, accepted by the Claimants on September 25, 2004
- CLAIM #2 - Canceled check #2643, September 26, 2004, from the Claimants to the Respondent, for \$2,000.00
- CLAIM #3 - Checking Account Summary for canceled check #2647, October 26, 2004, from the Claimants to the Respondent, for \$1,800.00
- CLAIM #4 - Canceled check #2652, November 5, 2004, from the Claimants to the Respondent, for \$3,600.00
- CLAIM #5 - Estimate, July 8, 2008, G & L Pools
- CLAIM #6 - Photograph of pool and deck
- CLAIM #7 - Photograph of pool liner
- CLAIM #8 - Photograph of pool deck and steps
- CLAIM #9 - Two photographs of pool deck

- CLAIM #10 - Four photographs of pool deck
- CLAIM #11 - Photograph of pool deck
- CLAIM #12 - Photograph of pool liner
- CLAIM #13 - Photograph of pool and yard
- CLAIM #14 - Claimants' Account, G & L Pools

The Fund submitted six exhibits that I admitted into evidence:

- FUND #1 - Memorandum, from the OAH to Legal Services, September 30, 2009, with attachment:
 - the Respondent's Notice of Hearing, with notice of unclaimed certified mail from the United States Postal Service (USPS)
- FUND #2 - Memorandum, from the OAH to Legal Services, September 9, 2009, with attachment:
 - the Respondent's Notice of Hearing and MHIC's Hearing Order, with notice of unclaimed certified mail from the USPS
- FUND #3 - Respondent's MHIC licensing history, December 22, 2009
- FUND #4 - Maryland Department of Assessments and Taxation, Baltimore County, information on the Respondent's residence, January 4, 2010
- FUND #5 - Home Improvement Claim Form, July 18, 2007, with letter from the Claimants
- FUND #6 - Letter, September 1, 2007, from John Borz, Chairman, MHIC, to the Respondent

Testimony

Ms. Meyd testified for the Claimants. The Respondent did not appear at the hearing. The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to the home-improvement contract at issue in this decision, the Respondent was licensed as a home-improvement contractor and salesman by the MHIC under individual registration number 01-6205. The Respondent operated under the business name of Viet Vet, Inc.
2. The Respondent's two most recent license renewals were effective from November 13, 2003 through December 18, 2005 and November 7, 2005 through December 18, 2007. The Respondent did not renew his license when it expired on December 18, 2007.
3. On September 3, 2009, the OAH sent a Notice of Hearing to the Respondent by certified mail and first-class mail to 18134 Gunpowder Road, Hampstead, Maryland 21074, the Respondent's last address of record with the MHIC.
4. As of January 4, 2010, the records of the Maryland Department of Assessments and Taxation reflected that the Respondent was the owner of the property 18134 Gunpowder Road, Hampstead, Maryland 21074, which was the Respondent's principal residence.
5. The USPS returned the certified mailing to the OAH as unclaimed, but did not return the first-class mailing.
6. At all times relevant to this decision, the Claimants lived at 4020 Beckleysville Road, Hampstead, Maryland 21074.
7. On September 25, 2004, the Respondent and the Claimants agreed in a written contract to have the Respondent perform home-improvement work on the Claimants' home for \$7,900.00.

8. The contract, in part, required the Respondent to make repairs to the deck of an eighteen-foot-by-thirty-foot, in-ground swimming pool with a diving board. The Respondent was supposed to: (a) repair cracks in the deck; (b) apply an epoxy coating to the entire deck so that the repaired areas would not be noticeable; and (c) apply stenciling around the border of the deck. This portion of the contract was priced at \$3,750.00.

9. On September 26, 2004, the Claimants paid the Respondent a deposit of \$2,000.00 by a personal check.

10. The Respondent performed work on the contract in October and November 2004, including some work on the pool deck.

11. The Claimants paid the Respondent \$1,800.00 on October 14, 2004 and \$3,600.00 on November 4, 2004.

12. The Respondent told the Claimants that he could not complete the work on the pool deck due to cold weather; he said he would return in the Spring to complete the work on the pool deck.

13. The epoxy coating that the Respondent placed on the pool deck did not settle properly. It dripped over the lip of the deck into the pool, causing significant damage to coping tiles, a set of steps into the pool, and the diving board.

14. Additionally, the dried epoxy, either by itself or during the Respondent's efforts to remove it from the interior of the pool, caused the pool liner to rip away from the wall of the pool, allowing water to leak onto the exposed floor of the pool. During the winter, the water froze and caused severe damage to the pool floor.

15. The Respondent called the Claimants in April 2005, and subsequently, on June 15, 2005, the Respondent met with Ms. Meyd at the Claimants' home. The Respondent looked at the work that had been performed on the pool deck and declared, "That work looks like crap."

16. The Respondent did not return to the Claimants' home. On July 9, 2005, the Claimants wrote a letter to the Respondent, in which they demanded that he complete the work on the pool deck by July 22, 2005. The Claimants subsequently extended that deadline to July 30, 2005, but the Respondent did not return to the Claimants' home.

17. In 2008, the Claimants had G & L Pools, Inc., the company that had originally installed the pool, rebuild their pool. The work included: (a) removal of the old concrete; (b) installation of new concrete; and (c) a new pool liner. The total contract price was \$20,335.00, including \$9,812.00 to replace the pool deck (\$5,125.00 to remove the damaged deck and \$4,687.00 for concrete for a new deck).

DISCUSSION

The Respondent's Notice of Hearing

The MHIC is required to send a hearing notice to a licensee or person at least 10 days before the hearing by certified mail to the business address of the licensee on record with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2004). If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the MHIC may hear and determine the matter. Md. Code Ann., Bus. Reg. § 8-312(h) (2004). In this case, the Respondent has not been licensed by the MHIC since his license expired on December 18, 2007. The USPS returned the certified mailing of the Respondent's Notice of Hearing to his last address of record in Hampstead as unclaimed; however, the USPS did not return the first-class mailing. Additionally, the Department of Assessment and Taxation records show the same Hampstead

address for the Respondent. I have no doubt at all that the Respondent was aware of this proceeding, and simply declined to claim the certified mailing. Therefore, it is appropriate for me to determine this claim against the Fund even in the Respondent's absence.

Claim

A home 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 & Supp. 2009). An "actual loss" is defined as "the costs of restoration, repair, replacement, or completion that arise from . . . incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2004). A claimant has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2004 & Supp. 2009). In the circumstances presented here, the Claimants have the burden to establish that they suffered an actual loss due to unworkmanlike acts of the Respondent. Md. Code Ann., Bus. Reg. §8-605(1) (2004). The MHIC may deny a claim if it finds that a claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2004 & Supp. 2009).

At the hearing, the Fund agreed with the Claimants that the Respondent had performed an unworkmanlike home improvement, and that the Claimants had suffered an actual loss. I concur. As outlined in the Findings of Fact, the evidence overwhelmingly established that the Respondent, in a misconceived effort to repair a few surface cracks in the pool deck, destroyed the Claimants' swimming pool.

The Award From the Fund

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

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

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

(c) If the contractor did work according to the contract and the Claimants has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the Claimants has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the Claimants 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.

The Fund agreed that the Claimants were entitled to recover the full amount requested in their claim - \$9,312.00. The Claimants did write \$9,312.00 on line 11 of the Home Improvement Claim Form; however, it is obvious from the form itself that the Claimants were confused. The amount of their claim was \$9,812.00 as they noted on line 9 of the form.

The appropriate calculation is as follows:

Amount Paid to Respondent for pool deck -	\$3,750.00
Plus	
Amount paid by Claimants to repair poor work -	<u>\$9,812.00</u>
Subtotal -	\$13,062.00
Less	
Amount of contract for pool deck -	<u>\$3,750.00</u>
Claim	\$9,812.00

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimants sustained an actual loss of \$9,812.00 as a result of the Respondent's acts, and that they are entitled to recover \$9,812.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-401 and 8-405(a) and (e) (2004 & Supp. 2009).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimants be awarded \$9,812.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent remain 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.

April 6, 2010
Date Decision Mailed

#112741


Robert F. Barry
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 21st day of May 2010, 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.



James Chiracol
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION