

**The Maryland Home
 Improvement Commission**

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**BEFORE THE
 MARYLAND HOME IMPROVEMENT
 COMMISSION**

**v. Lawrence Soth
 t/a S & S Home Improvements
 (Contractor)
 and the Claim of
 Linda Burstyn
 (Claimant)**

MHIC No.: 08 (90) 109

FINAL ORDER

WHEREFORE, this 28th day of July 2016, Panel B of the Maryland Home

Improvement Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated January 28, 2016 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated January 28, 2016 are AFFIRMED.**
- 3. The Proposed Order dated January 28, 2016 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
**Joseph Tunney, Chairperson
 PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM
OF LINDA BURSTYN,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF LAWRENCE LEE SOTH,
T/A S&S HOME IMPROVEMENTS,
RESPONDENT.

* BEFORE EMILY DANEKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-15-07774
* MHIC No.: 08 (90) 109
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On January 22, 2009, Linda Burstyn (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission's (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,331.00 in alleged actual losses suffered as a result of a home improvement contract with Lawrence Lee Soth, trading as S&S Home Improvement (Respondent). By letter dated August 31, 2010, the Claimant amended her claim from \$8,331.00 to \$4,290.00.

A hearing on the Claim was originally held on June 12, 2012 before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH). On September 5, 2012, the

ALJ issued a Proposed Decision and Order recommending that the Claimant be awarded \$3,790.00 from the Fund and that the Respondent be ineligible for a license from the MHIC until he reimbursed the Fund for the amount paid, plus interest allowed by law. The MHIC affirmed the recommended Order and the Respondent appealed to the Circuit Court for Baltimore County. On May 19, 2014, the Circuit Court issued an Order reversing the decision of the MHIC and remanding the matter for a new hearing before an ALJ. Accordingly, on January 30, 2015, the MHIC remanded the matter to the OAH for a *de novo* hearing on the merits of the Claim.¹

I held the *de novo* hearing on August 14, 2015 at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-407 (2015). The Claimant was present and represented by Yehoshua Bier, Esquire. The Respondent represented himself. 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 (2014); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

ISSUES

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

¹ The MHIC ordered the instant case to be conducted *de novo*; thus, it could be heard by any ALJ, and did not have to be heard on remand by the original ALJ.

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered the following exhibits, which I admitted into evidence:

- Clmt. Ex. 1 - S&S Home Improvements Contract Agreement, dated October 28, 2005
- Clmt. Ex. 2 - Tag Electric Contractors, Inc. Invoice No. 55300 and Proposal, both dated June 8, 2007
- Clmt. Ex. 3 - MHIC Complaint Form, dated July 17, 2007, and Home Improvement Claim Form (unsigned), dated June 18, 2008
- Clmt. Ex. 5 - Baltimore County Uniform Code Enforcement Correction Notices issued to the Claimant and Harry Burstyn and to the Respondent, both dated April 30, 2009
- Clmt. Ex. 6 - Sheldon & Sons, Inc. Receipt, dated April 8, 2010
- Clmt. Ex. 7 - List of extra-contractual work, with costs, undated

The Claimant also offered, as Claimant Exhibit 4, an invoice from Harold's Plumbing and Electric, LLC, dated February 22, 2009. I sustained the Fund's objection to the admission of this exhibit as there was no supporting testimony for it. This document was retained as part of the official case record but was not admitted into evidence. COMAR 28.02.01.22C.

The Respondent did not offer any documents into evidence.

The Fund offered the following exhibits, which I admitted into evidence:

- Fund Ex. 1 - Notice of Hearing, dated June 12, 2015
- Fund Ex. 2 - MHIC Hearing Order, dated July 14, 2011
- Fund Ex. 3 - MHIC Remand Order, dated January 30, 2015, with attached Opinion and Order from the Circuit Court for Baltimore County, issued May 19, 2014
- Fund Ex. 4 - Respondent's Licensing Record, printed August 13, 2015
- Fund Ex. 5 - Home Improvement Claim Form, received January 26, 2009
- Fund Ex. 6 - Letter from the MHIC to the Respondent, dated February 3, 2009

Fund Ex. 7 - Letter from the Claimant to the MHIC, dated August 31, 2010

Fund Ex. 8 - Letter from the MHIC to the Respondent, dated September 29, 2010

Testimony

The Claimant presented the testimony of Harry Burstyn, her husband. The Respondent testified on his own behalf. The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 01-46359.
2. At all relevant times, the Claimant and her husband² were the owners of a home located at 6716 Laurelwood Avenue in Baltimore County, Maryland (Residence). This is the Homeowners' primary residence.
3. The Residence was constructed in the 1950s. Its electrical had not been updated prior to the events at issue.
4. On October 28, 2005, the Claimant and the Respondent entered into a contract (Contract) to expand the Claimant's kitchen. The Contract work consisted of
 - expanding the entranceway to the kitchen
 - removing and relocating walls to expand the kitchen area
 - relocating duct work
 - making the ceiling flush
 - removing and replacing kitchen cabinets and counter tops
 - installing cabinet and drawer pulls

² The Claimant and her husband will hereinafter be referred to collectively as the Homeowners.

- installing baseboards and shoe moulding
- adding ground fault interrupter (GFI) outlets
- relocating electrical switches and a phone jack and adding additional phone jacks
- installing a new range
- installing under cabinet lighting
- running new wire and a circuit breaker for a dishwasher
- disconnecting the dishwasher, sink, and range (no hook up)
- changing the lighting in the ceiling
- patching the floor
- finishing the walls and ceiling
- priming and painting the walls and ceiling in the kitchen and dining room
- repairing the basement ceiling in connection with plumbing work
- removing construction debris.

5. The Contract provided that the work would begin on October 28, 2005 and would be completed within 21 days.

6. The original agreed-upon contract price was \$5,650.00. The Homeowners were to provide the cabinets, countertops, appliances, moulding, lighting, and drawer pulls.

7. The Homeowners paid the Respondent a deposit of \$1,800.00 on October 28, 2005.

8. At the time of contracting, the Homeowners knew that the Respondent was licensed by the MHIC as a home improvement contractor.

9. At the time of contracting, the Respondent knew that under applicable law, the electrical work specified in the Contract and the Addendum was required to be performed by a licensed electrician.

10. The Respondent was not a licensed electrician.

11. The Homeowners and the Respondent entered into an addendum to the Contract (Addendum), in which they agreed that the Respondent would perform specified additional work at a cost of \$1,860.00. The additional work included moving an electrical outlet, installing two new electrical switches, installing a dimmer switch, running wires and installing a switch for a second garbage disposal, and adding a ceiling fan in the basement.

12. The Respondent undertook the work called for in the Contract and the Addendum, including the electrical work. He concluded his work in the spring of 2006.³

13. The Respondent did not obtain a permit for the electrical work and he did not have the electrical work inspected.

14. The Homeowners paid the Respondent a total of \$7,510.00: the original Contract price of \$5,650.00 plus \$1,860.00 for the agreed-upon additional work.⁴

15. In the spring of 2007, approximately one year after the Respondent concluded his work, the overhead lights in the kitchen stopped working, as did a microwave. The Homeowners also noticed a burning smell.

16. The Homeowners contacted the Respondent, but when he did not respond to them that same day, the Homeowners contacted Tag Electric Contractors, Inc. (Tag), a licensed electrical contractor, to service the electrical systems in their kitchen.

³ The parties were unable to more specifically state when the Respondent concluded his work.

⁴ Neither of the witnesses provided dates or supporting documentation for the payments. The Homeowners and the Respondent agreed, however, that the amounts owed under the Contract and Addendum were paid in full.

17. In June 2007, Tag performed the following work in the Homeowners' kitchen, per its Proposal and Invoice:⁵

- Install five to seven 20-amp small appliance circuits wired into the countertop receptacle
- Open all kitchen switch and receptacle boxes to make sure the wiring and connections are good
- Check wiring for two dishwashers
- Open and check nine recessed lights
- Check box and wiring for two ceiling fans
- Check wiring for two garbage disposals

18. In order to perform this work, Tag made holes in the drywall to access and inspect the wiring behind the walls.

19. The Homeowners paid Tag \$2,200.00 for the work in their kitchen.

20. A Baltimore County Inspector issued separate Uniform Code Enforcement Correction Notices (Correction Notices) to the Homeowners and to the Respondent for code violations in connection with the Respondent's kitchen renovation.⁶

21. The Correction Notice issued to the Homeowners was for violations of sections 35-2-304(B)(1) and 21-7-302(B) of the Baltimore County Code, for failure to have the necessary electrical permit for the kitchen renovation and for failure to have all work inspected.

⁵ There testimony did not shed additional light on the specifics of the work performed by Tag.

⁶ The date that the Baltimore County inspector inspected the Residence and issued the Correction Notices is uncertain. Although the Correction Notices were clearly dated April 30, 2009, and required correction by May 30, 2009, Mr. Burstyn testified that as he recalled, the inspector came out and inspected the Residence and issued the Correction Notices in 2007, not 2009. Mr. Burstyn's timeline would logically be more consistent with the timeline of events. In connection with the issues raised in this case, the inspector's issuance of the Correction Notices to the Homeowners and the Respondent is, in itself, more important than the date of issuance.

22. The Correction Notice issued to the Respondent was for violations of sections 35-2-304(B)(1), 21-7-202, 35-2-304(B)(3), 21-7-303, and 21-7-302(B). The Correction Notice explained that the Respondent “unlawfully violate[d] . . . Baltimore County laws,” as follows:

- “Need a permit Baltimore County Code”
- “Need a electrical license”
- “\$1,000.00 fine for working without a permit or a license”
- “All work must be inspected and comply with the National Electric Code”
- “All work must be inspected”
- “Above section refer to kitchen rehab only”

23. In the absence of a permit and inspection, the Respondent’s work on the Claimant’s kitchen was incomplete.

24. On January 26, 2009, the Homeowners filed their Claim with the MHIC.

25. In or about April 2010, Sheldon & Sons, Inc. (Sheldon & Sons) repaired the holes Tag made in the kitchen’s drywall during the June 2007 electrical work. Sheldon & Sons then painted the Homeowners’ kitchen and the adjoining living room and bathroom.

26. The Homeowners paid Sheldon & Sons \$1,590.00 for this work.

27. The Homeowners have not filed legal proceedings against the Respondent and they do not have an insurance claim that will permit recovery of their loss. They have not filed a claim with any other governmental entities to recover their loss.

DISCUSSION

The Claimant made two arguments in support of her claim against the Fund. First, she asserted that the Respondent’s work was inadequate and unworkmanlike because he used the wrong gauge wiring and did not perform the work in compliance with the applicable code

requirements. Second, she contended that the Respondent's work was incomplete because he never obtained a permit for, or inspection of his electrical work. She sought to recover, as her actual loss, a total of \$3,790.00, which represents the amounts paid to Tag and Sheldon & Sons. For the reasons set forth below, I find that the Claimant has proven eligibility for compensation for an incomplete home improvement.

I. Relevant Law

In 1962, the Maryland General Assembly (Legislature) enacted the Maryland Home Improvement Law, now found at sections 8-101, et seq., of the Business Regulation article of the Maryland Code. The purpose of the statutes is the protection of the public. *See Harry Berenter, Inc. v. Berman*, 258 Md. 290, 294 (1970); *Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 248 (2003); *Brzowski v. Maryland Home Improvement Comm'n*, 114 Md. App. 615, 628 (1997). In 1985, the Legislature enacted further legislation that established the Fund. 1985 Md. Laws, ch. 116 §2. This legislation created an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. *See Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015)*.⁷ The Fund is not, however, to be used as a means of penalizing contractors. *See Landsman*, 154 Md. App. at 257.

⁷ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume. Although the Claimant and Respondent entered into the Contract in 2005, the work was undertaken between 2005 and 2006, the alleged deficiency was discovered in 2007, and the Claim was filed in 2009, any subsequent amendments to the applicable law apply to the Claim because compensation from the Fund is a matter of statute and the Claimant does not yet have a vested right to compensation. *See Landsman*, 154 Md. App. at 255 (explaining that the right to compensation from the Fund is a "creature of statute" and that "[a]mendments to such rights are not bound by the usual presumption against retrospective application, and these rights are subject to change 'at the whim of the legislature'").

A homeowner is authorized to “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). The statutes governing the Fund define “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement”; thus making clear that a compensable “act or omission” is synonymous with an “unworkmanlike, inadequate, or incomplete home improvement.” *Compare* Md. Code Ann., Bus. Reg. § 8-401, *with* Md. Code Ann., Bus. Reg. § 8-405(a). Moreover, through the definition of “actual loss,” the Legislature limited the scope of recovery from the Fund to the categories of costs enumerated in section 8-401. *Brzowski v. Maryland Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). “The Fund may only compensate for actual losses [a claimant] incurred as a result of misconduct by a licensed contractor.”⁸ COMAR 09.08.03.03B(2); *see also Brzowski*, 114 Md. App. at 631-33.

Section 8-405 of the Business Regulations Article places additional limitations on a claimant’s recovery from the Fund as well. For instance, a claimant may recover no more than \$20,000.00 per claim from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1). Further, a claimant cannot recover an amount in excess of the amount paid to the contractor and cannot recover any consequential damages. Md. Code Ann., Bus. Reg. § 8-405(e)(3), (5).

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that, at all relevant times: (a) the claimant owned fewer than three dwelling places; (b) the work at issue concerned the claimant’s personal residence in Maryland;

⁸ Under this statutory scheme, all licensed contractors are assessed for the monies that subsidize the Fund. When the Fund pays out money to a homeowner as a result of a faulty or incomplete performance by a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of such contractor until the contractor fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

(c) the claimant was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (i) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1) and (2).

At a hearing on a claim, the claimant bears the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant's burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[.]" when all of the evidence is considered. *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*

II. Prerequisites to Recovery

The evidence establishes the prerequisites for recovery from the Fund: the Respondent was a licensed home improvement contractor at all times relevant to this dispute, (*see* Fund. Ex. 4); the contract between the parties did not contain an arbitration clause, (*see* Clmt. Ex. 1); the Claim was filed within three years of the date of the Claimant discovered the alleged loss, Md.

Code Ann., Bus. Reg. § 8-405 (g), (Fund Ex. 5), (Testimony of H. Burstyn); the Residence was the Claimant's personal, existing, residence (Testimony of H. Burstyn); the Claimant is not a relative or employee of the Respondent; the Claimant did not reject the Respondent's efforts to resolve the claim;⁹ there is no pending insurance claim or litigation arising out of this work.

(Testimony of H. Burstyn.)

III. The Merits of the Claim

A. The Evidence

It was apparent at the hearing that the passage of time--nearly ten years since the Homeowners and the Respondent entered into the Contract--greatly impacted the witnesses' ability to recall and testify about the events at issue. Despite the obstacle presented by the passage of time and fading memories, the documents in evidence, supplemented with the testimony from the Respondent and Mr. Burstyn, firmly establish that the Claimant and the Respondent entered into a contract for a kitchen renovation and the work specified in the Contract and Addendum included the following electrical work:

- Adding GFI outlets
- Moving electrical switches
- Installing under-cabinet lights and switch
- Running new wiring and a circuit breaker for a dishwasher
- Running wires and a switch for a second garbage disposal
- Moving an electrical outlet

⁹ As the Respondent is not licensed to perform electrical work, he was unable to personally perform work or repairs to resolve the Claim. Further, the testimony was that he never made an offer to pay or reimburse the Homeowners for any costs to inspect or repair his electrical work.

- Installing a ceiling fan in the basement
- Installing two new switches.

Beyond these facts, the testimony was largely at odds.

In support of the Claim, the Claimant's husband, Harry Burstyn, testified that for approximately one year, he and his wife were happy with the Respondent's work. Then, in the spring of 2007, the electrical systems in the kitchen began to fail. He testified that a light switch began to buzz when it was turned on, some lights did not turn on, and a microwave failed. The Homeowners became highly concerned when they noted a burning smell in the kitchen. They were concerned about a potential fire hazard. Mr. Burstyn testified that they attempted to contact the Respondent, but when they did not hear back from the Respondent within twenty-four hours, they contacted Tag to address their concerns.

Mr. Burstyn testified that after Tag inspected their kitchen, it initially refused to work on the electrical circuitry in the kitchen, due to alleged code violations. He further testified that Tag told him the County had to be called to perform an inspection, and the County came out and inspected and shut down the kitchen because of code violations. Mr. Burstyn's testimony was that, thereafter, Tag performed work to remedy the code violations in the kitchen. He explained that Tag had to get under the walls and make holes in the walls, which necessitated drywall repair and painting. Tag performed all of its work in approximately one week, or less, including installation of between five and seven 20-amp small-appliance circuits. Mr. Burstyn did not know if Tag replaced the wiring and was unable to provide information about the precise work performed by Tag. Mr. Burstyn testified that because they were unable to match the existing paint in the kitchen, they had Sheldon and Sons repaint the entire kitchen, as well as some adjoining areas.

As to the issue of the Respondent's unlicensed status, Mr. Burstyn testified that, given his work in the insurance industry, it was very important to him that the Respondent was a licensed contractor. Mr. Burstyn denied prior knowledge that the Respondent was not licensed to perform this electrical work. At the time the Homeowners retained the Respondent, Mr. Burstyn understood that the Respondent's license authorized the Respondent to legally perform all of the Contract work. He acknowledged, however, that his wife, the Claimant, handled most of the direct communication with the Respondent. When questioned as to whether his wife ever told him that the Respondent was not licensed to perform electrical work, he explained that he and his wife worked closely as a team and he did not recall any conversation with his wife regarding the Respondent's licensing status or qualifications to perform electrical work.

The Respondent, in his testimony, acknowledged that the Contract and Addendum specified the scope of his work, that he installed a dishwasher, garbage disposal, and ceiling fan, and that he put in three small-appliance circuits. The Respondent conceded that he knew the electrical work he performed at the Residence was required to be done by a licensed electrician. The Respondent also conceded that he knew a permit and inspection were required for this work.

The Respondent further testified that he informed the Claimant: that he was not licensed to do this work, but that it was the type of work a homeowner might ordinarily do, and that despite the lack of a license, he was capable of performing the work, and he could do so at a cost-savings to the Homeowners. The Respondent stated that the Claimant, having been informed that the Respondent was not licensed to perform the electrical work, agreed to have the Respondent undertake the electrical work anyway.

The Respondent performed the electrical work without obtaining a permit or inspection. He maintained that his electrical work was properly done and that the Claimant produced no

evidence that the work done by Tag included replacing any of the Respondent's work. Finally, he denied that the Homeowners contacted him with their concerns about the work; asserting that he first learned of their concerns when he received the Claimant's complaint from the MHIC.

Although the Claimant was present at the hearing, she was not called to testify by any party. Thus, she did not testify as to whether the Respondent informed her that he was not licensed to perform electrical work. No expert testimony was offered on the issue of alleged defects in the electrical work performed by the Respondent.

B. The Claimant did not Establish an Unworkmanlike or Inadequate Home Improvement

The Homeowners did not present any expert testimony to support their contention that the electrical work performed by the Respondent was unworkmanlike or inadequate. This leaves the Homeowners with three possible sources of evidence to support their claim that the work was unworkmanlike and inadequate—the documentation from Tag, the documentation from the Baltimore County Department of Permits and Development Management, and circumstantial evidence. For the reasons set forth below, this evidence is insufficient to sustain the Claimant's burden of proof.

The documentation from Tag is insufficient to establish that inadequate or faulty workmanship by the Respondent was the cause of the electrical failure in the Homeowner's kitchen. Although the documents reflect that Tag inspected the wiring in the kitchen and installed additional small-appliance circuits, Tag did not note that the additional circuits were required to rectify any deficiencies caused by the Respondent's work. Tag did not note any particular deficiencies in the electrical work in the kitchen. Indeed, Mr. Burstyn was unable to describe with any specificity what Tag did in the kitchen. The Circuit Court has already held, in the prior appeal of this matter, that this documentation from Tag, verifying that it inspected the

electrical work performed by the Respondent, is insufficient to establish that the Respondent's electrical work was performed in an unworkmanlike or inadequate manner. (See Fund Ex. 3 at Opinion and Order, pp. 7-8.)

Similarly, the documentation from the County does not establish that the Respondent's work was unworkmanlike or inadequate. The Correction Notice issued to the Respondent recites that it is for a violation of section 21-7-303 of the Baltimore County Code, among other sections. As the basis for the violation, the Correction Notice states: "All work must be inspected and comply with the National Electric Code[.]" (Clmt. Ex. 5 at 2.) It does not specify any particular defect. Indeed, it does not even state that the work performed actually violates the National Electric Code; it simply requires that the work must be inspected and be found to be in compliance or, if not, that it be corrected. Further, the Claimant produced no evidence that the inspector who issued the Correction Notices actually looked inside the walls and, thus, had first-hand knowledge of the scope or quality of the Respondent's work, or whether he simply based the Correction Notices on a review of records reflecting the lack of a license, permit and inspection. Mr. Burstyn was unable to specify what corrections, if any, Tag was required to make to bring the electrical up to the standards of the National Electric Code. Accordingly, the Correction Notices, even when supplemented with Mr. Burstyn's testimony, are insufficient to establish a defect in the Respondent's work.

Finally, I considered the circumstantial evidence presented by the Claimant, which consisted of Mr. Burstyn's testimony regarding the electrical problems the Homeowners experienced in the renovated portions of the kitchen. In some cases, circumstantial evidence or lay testimony may be sufficient to establish a defective performance. This is not one of those cases. The proper installation of electrical work is beyond the ken of the average layperson and

is not a matter that can ordinarily be established without expert testimony.¹⁰ This is particularly true here, in light of the age of the Residence's pre-existing electrical system (dating from the 1950s) and the additional load placed on that pre-existing system during the renovation—including an additional dishwasher, lighting, and garbage disposal. Thus, the mere fact that the Homeowners experienced an electrical failure is insufficient to establish that the Respondent's work was unworkmanlike or inadequate.

Moreover, the passage of approximately one year between the time the Respondent concluded his work and the time the Homeowners began to experience difficulty with his electrical work negates the ability to rely on this circumstantial evidence to establish the Respondent's faulty workmanship or inadequate performance. *Cf. Peterson v. Underwood*, 258 Md. 9, 19 (1970) (explaining that "[a]n inference . . . depends on logical deduction from an established fact. . . . [a]s the temporal distance between the established fact and a later occurrence increases, the logical force of a causal link between them diminishes"). That is, evidence that the Homeowners had electrical problems in their kitchen one year after the Respondent completed his work, does not establish, by a preponderance of the evidence, that the Respondent's work itself was defective, thereby causing the electrical failure.

Despite the Circuit Court's prior ruling, the Homeowners again chose to proceed without expert testimony from Tag or anyone else. The evidence presented is legally insufficient to establish that the Respondent's work was unworkmanlike or inadequate.

C. The Claimant Established that the Home Improvement was Incomplete

The Respondent acknowledged that he knew applicable law required that a licensed

¹⁰ In this regard, it is noteworthy that the electrical work required a license, and a competency examination is a prerequisite to becoming licensed to perform that work. *See* Baltimore County Code, §§ 21-7-202, 212-7-205.

electrician perform the electrical work contemplated under the Contract and Addendum. *See also* Baltimore County Code, § 21-7-202; (Clmt. Ex. 5). He also acknowledged that a permit and an inspection were required for that work. *See also* Baltimore County Code, § 21-7-302, 35-2-304(B)(3); (Clmt. Ex. 5). The Respondent conceded in his testimony, as the County's citations further evidence, that he was not a licensed electrician and that he did not obtain an electrical permit for the work at the Residence. As a result, the electrical work was not inspected, as required, before the Respondent concluded his work at the Residence.

The Respondent further testified that he informed the Claimant that he was unlicensed and that the Homeowners were aware of his status, but they agreed to have him proceed with the electrical work in order to save costs. Mr. Burstyn denied knowing that the Respondent was not licensed to perform the electrical work and explained that he believed the Respondent's license from the MHIC authorized him to perform all of the work. In evaluating the credibility of this aspect of the Respondent's testimony and the weight to be given to it, I considered that, by his own admission, he was willing to knowingly and intentionally violate the licensing requirement. Overall, I found Mr. Burstyn's contrary testimony to be more credible in light of his detailed explanation of why it was important to him that the contractor be duly licensed for all work: due to his insurance background and the presence of a daycare in the home. Accordingly, I do not credit the Respondent's argument that the Homeowners knowingly approved of him doing the work without a license, and thus without a permit or an inspection. *Cf. DeReggi Constr. v. Mate*, 130 Md. App. 648, 661-62 (2000) (explaining, in a mechanic's lien case, that the factors to be considered in determining if a contractor substantially complied with a licensing requirement include consideration of whether the homeowner knew of the contractor's unlicensed status and continued to permit the contractor to perform).

The Contract and Addendum do not specify which party was to be responsible for obtaining the necessary permit and inspection. The Baltimore County Code, however, puts the responsibility of obtaining a permit on the electrician:

Permits.

(a) *In general.* Permits shall be applied for and issued as provided in this title.

...
(c) *Installations, alterations, and repairs in general.* A master general or restricted electrician shall apply for a permit from the Department before making any electrical installations, alterations, or repairs.

Baltimore County Code, § 21-7-301. The Baltimore County Code further contemplates that the work will be inspected to ensure compliance with standards. *See* Baltimore County Code, §§ 21-7-302(c), 21-7-303. It is the issuance of a permit that triggers a subsequent inspection—without the permit, the County is not aware of the need for an inspection.

The Respondent used his status as a licensed Maryland home improvement contractor to obtain the contract for the work at the Residence; the Homeowners' relied upon his status as a licensed contractor in agreeing to the Contract and Addendum. (Testimony of H. Burstyn.) If the Respondent had used a licensed electrician for the work that required a licensed electrician, as he should have, it would have been the electrician's responsibility to obtain a permit—not the Homeowners. *See* Baltimore County Code, § 21-7-301(c). As it would have been the electrician's obligation to obtain the permit, not the Homeowners' obligation, I will not absolve the Respondent of that obligation where he performed the work in knowing violation of the license, permit, and inspection requirements of the Baltimore County Code. To conclude otherwise would allow the Respondent, a licensed home improvement contractor, to intentionally perform work, in violation of a separate licensing requirement, and then use his lack of a license to defend against a claim by the Homeowners, who believed the Respondent to be licensed for all the work he agreed to perform. This would be entirely inconsistent with the purpose of the

Home Improvement law generally—to protect homeowners from unscrupulous home improvement contractors.

In the absence of the required permit and inspection, the electrical work cannot be considered complete. The lack of a permit and inspection were two of the bases for Baltimore County's Correction Notices, which resulted in the County shutting down the kitchen and requiring additional action. Plainly, further work was required in order for the electrical work to be approved and for the Homeowners to be able to resume use of their kitchen. As additional steps were required, the home improvement was incomplete.

D. The Claimant Sustained an Actual Loss

Having concluded that the home improvement was incomplete, I next consider whether the Claimant has established a resultant "actual loss." Md. Code Ann., Bus. Reg. § 8-405(a). As noted above, actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." *Id.* § 8-401.

In support of her claimed actual loss, the Claimant submitted an invoice from Tag totaling \$2,200.00. (Clmt. Ex. 2.) Mr. Burstyn testified that he and his wife paid this amount to Tag. The invoice reflects the following charges, which I have numbered for ease of reference:

1. Install five to seven 20-amp small appliance circuits wired in to countertop receptacle	\$1,050.00
2. Open all kitchen switches and receptacle boxes to make sure the wiring and connections are good	\$300.00
3. Check wiring in two dishwashers	\$100.00
4. Open and check nine recessed lights	\$450.00
5. Check box and wiring for two ceiling fans	\$200.00
6. Check wiring for two garbage disposals	\$100.00
Total	\$2,200.00

(Clmt. Ex. 2.)

As set forth above, the Claimant established that the home improvement was incomplete because it was performed by an unlicensed person and, therefore, lacked a permit and inspection. The Claimant was required by Baltimore County to correct the lack of permit and inspection before she could resume using her kitchen. (Clmt. Ex. 5.) The exhibits and Mr. Burstyn's testimony established that the work specified in items two through six above was performed to obtain the requisite approvals and, thereby, complete the home improvement. The Homeowner's paid Tag a total of \$1,150.00 for this work, which will be considered in my calculation of the Claimant's actual loss.

As further noted above, the Claimant failed to prove that the Respondent's work was substantively defective. Accordingly, the work specified in item one above, for the installation of the small appliance circuits, cannot properly be considered in calculating the amount of the Claimant's actual loss. *See* Md. Code Ann., Bus. Reg. § 8-405(a) (limiting recovery to loss that "results" from an act or omission); COMAR 09.08.03.03B(2) (limiting payment from the Fund to "actual losses . . . incurred as a result of misconduct by a licensed contractor"). Thus, in calculating the amount of the Claimant's actual loss, I will not consider the \$1,050.00 paid for this work.

The Claimant also sought to recover the \$1,590.00 paid to Sheldon & Sons. In support of her claim for this amount, the Claimant submitted a receipt from Sheldon & Sons that described the work as:

Interior work to:	
Kitchen E nook, Living Room, Bath	\$1,590.00
...	
Painting and drywall work repairs due to repair of kitchen renovation damage[.] Hanging of kitchen cabinets broke through wall into adjoining bathroom.	

(Clmt. Ex. 6.) Mr. Burstyn testified that this work was necessitated because Tag had to make holes in the kitchen drywall to complete its inspection. Mr. Burstyn recalled that the bathroom and living room may have provided an access point for some of the work and that the living room paint also matched the kitchen paint; for these reasons, he explained, Sheldon & Sons repainted the bathroom and living room in addition to the kitchen.

The receipt from Sheldon & Sons is dated April 8, 2010. Mr. Burstyn could not definitively explain why the receipt was dated nearly three years after Tag performed its work, but he posited that his wife may have contacted Sheldon & Sons for a receipt a year after the work was performed. He was unable to state with certainty, however, when Sheldon & Sons performed the painting work. Although the receipt reflects that the Homeowners paid Sheldon & Sons by credit card, the Claimant did not offer additional documentation that would show that the painting work was performed close in time to Tag's work (*i.e.*, that it was necessitated by Tag's work).

Moreover, the receipt reflects that it was for painting the living room and bathroom as well as the kitchen and for hanging kitchen cabinets. The testimony did not adequately explain why the living room and bathroom would also need to be painted or why professional painters were unable to employ color matching so that only the disturbed areas of the kitchen would require painting. Nor did the testimony adequately explain why cabinets still needed to be hung. Mr. Burstyn was too uncertain and tentative in his testimony to support a claim for the entire cost of painting all three rooms and the receipt did not break down the cost of the painting on a per-room basis.

In light of the unexplained apparent two to three year delay between Tag's work and the painting by Sheldon & Sons and because the scope of the work exceeded what was seemingly

necessitated by Tag's inspection, without any further breakdown of the costs, the Claimant has failed to establish, by a preponderance of the evidence, that the amount paid to Sheldon & Sons was a result of the Respondent's incomplete repair. See Md. Code Ann., Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(1), (2). Therefore, my calculation of the Claimant's actual loss will not consider the \$1,590.00 that the Homeowners paid to Sheldon & Sons.

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

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

COMAR 09.08.03.03B(3)(c).

The Claimant's actual loss is calculated as follows:

\$ 7,510.00	paid to the Respondent
+ <u>\$1,150.00</u>	to complete the incomplete work
\$8,660.00	
- <u>\$7,510.00</u>	price under Contract and Addendum
\$1,150.00	actual loss

The amount of the Claimant's actual loss is within the statutory cap on claims against the Fund. Bus. Reg. § 8-405(e)(1). Thus, the Claimant's recovery is for the full amount of her actual loss, \$1,150.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$ 1,150.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

RECOMMENDED ORDER

I **RECOMMEND** that the MHIC:

ORDER that the Fund award the Claimant \$1,150.00; and

ORDER that the Respondent is ineligible for an MHIC license until the Respondent reimburses the Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the MHIC;¹¹ and

ORDER that the records and publications of the MHIC reflect this decision.

November 4, 2015
Date Decision Issued

Signature on File

Emily Darjeker
Administrative Law Judge

ED/da
158882

¹¹ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 28th day of January, 2016, 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