



**IN THE MATTER OF THE CLAIM  
OF FRED BERGNER  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR ALLEGED VIOLATIONS OF  
JAMES MACRI, JR.  
t/a CREATIVE SPACES HOME  
IMPROVEMENTS**

**\* MARYLAND HOME  
\* IMPROVEMENT COMMISSION**

**\* MHIC CASE NO. 08 (90) 2252**

\* \* \* \* \*

### FINAL ORDER

**WHEREFORE, this 10<sup>TH</sup> day of June, 2011, 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 Affirmed.**
- 3) The Amended Proposed Order of the Commission dated December 8, 2010 is Amended as follows:**
  - A) On October 5, 2010, a Proposed Order was issued by the Commission to affirm the recommended decision of the Administrative Law Judge to award the Claimant \$3,300.00. No exceptions were filed within the 20 day period provided by law. The Proposed Order was not amended within the 20 day period. Therefore, the October 5, 2010 Proposed Order became final at the conclusion of the 20 day exceptions period on October 26, 2010.**
  - B) The Amended Proposed Order of the Commission dated December 8, 2010 was not timely issued.**
  - C) The October 5, 2010 Proposed Order of the Commission is Affirmed.**

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**Claim of Fred Bergner**  
**June 10, 2011**  
**Page 2**

**D) Pursuant to the October 5, 2010 Proposed Order of the Commission, the Claimant is Awarded \$ 3,300.00 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.**

**Andrew Snyder**  
**Chair - Panel B**  
**MARYLAND HOME IMPROVEMENT**  
**COMMISSION**

IN THE MATTER OF THE CLAIM OF  
FRED BERGNER

v.

JAMES MACRI, JR.,  
t/a CREATIVE SPACES HOME  
IMPROVEMENTS

\* MARYLAND HOME  
IMPROVEMENT COMMISSION

\* MHIC CASE NO. 08 (90) 2252

\* \* \* \* \*

**AMENDED PROPOSED ORDER**

WHEREFORE, this 8<sup>TH</sup> day of December, 2010, Panel B of the Maryland Home Improvement Commission ORDERS that the Proposed Order issued on October 5, 2010 is AMENDED as follows:

1) The Findings of Fact of the Administrative Law Judge are Affirmed.

2) The Conclusions of Law are Amended as follows:

A) Pursuant to Business Regulation Article, §8-405(c)(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.

B) The Administrative Law Judge found that the Claimant paid a total of \$2,000.00 Respondent. (Finding of Fact No. 4). Pursuant to Business Regulation Article, §8-405(c)(5), Annotated Code of Maryland, the Commission may not award more than \$2,000.00 to the Claimant.

3) The Proposed Order is Amended as follows:

A) The Claimant is awarded \$2,000.00 from the Home Improvement Guaranty Fund.

**Amended Proposed Order - 08 (90) 2252  
In The Matter Of The Claim Of  
Fred Bergner  
December 8 , 2010  
Page 2**

**4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.**

**Andrew Snyder  
Chairperson - Panel B  
Maryland Home Improvement Commission**

IN THE MATTER OF THE CLAIM OF	*	BEFORE JAMES T. MURRAY,
FRED BERGNER AGAINST THE	*	AN ADMINISTRATIVE LAW JUDGE
MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JAMES MACRI, JR.,	*	OAH NO.: DLR-HIC-02-09-42931
T/A CREATIVE SPACES HOME	*	MHIC NO.: 08 (90) 2252
IMPROVEMENTS	*	
* * * * *		

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On October 7, 2008, Fred Bergner (the Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,300.00 for actual losses allegedly suffered as a result of a home improvement contract with James Macri, Jr., t/a Creative Spaces Home Improvements. The MHIC referred the claim to the Office of Administrative Hearings (OAH) on October 5, 2009.

I held a hearing on June 28, 2010 at the OAH, Hunt Valley, Maryland in accordance with sections 8-312(a) and 8-407(c)(2)(i) of the Business Regulation Article, Annotated Code of Maryland (2010). Hope Sachs, Assistant Attorney General, represented the Fund. The Claimant

represented himself, as did the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, 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.

### **ISSUES**

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

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. # 1 - Report from AA Home Inspection Service, Inc., October 1, 2008
- Cl. Ex. # 2 - Narrative, undated
- Cl. Ex. # 3 - Letter from the Claimant to the Respondent, December 19, 2007, with attached photograph
- Cl. Ex. # 4 - Letter from Claimant and Maureen Cannon to Investigator William Banks, December 12, 2008
- Cl. Ex. # 5 - Swatch of fence fabric
- Cl. Ex. # 6- Photocopy of check number 7294 to Creative Spaces, July 7, 2007
- Cl. Ex. # 7- Proposal from New Image Building & Remodeling, August 30, 2008

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

- Fund Ex. # 1 - Notice of Hearing, April 28, 2010 and Hearing Order, October 1, 2009
- Fund Ex. # 2 - Licensing Information for Respondent, printed June 14, 2010

Fund Ex. # 3 - Letter from John Borz to the Respondent, October 31, 2008 and Home Improvement Claim Form, October 3, 2008

No exhibits were offered on behalf of the Respondent.

Testimony

The Claimant presented the testimony of Maureen Bergner and Russell W. Allen. Mr. Allen was admitted as an expert in home improvement construction. The Respondent testified on his own behalf.

**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 3822367. The Respondent's license expires April 10, 2011.
2. During the first week of July 2007, the Claimant entered into a verbal contract with the Respondent to have the Respondent install thirty-three 4 inch by 4 inch pressure treated fence posts around the perimeter of the property surrounding his home located at 825 Seneca Park Road in Middle River, Maryland.
3. The contract price was \$2,000.00 and did not include the cost of the fence posts, \$1,240.00, which were provided by the Claimant.
4. Work under the contract began immediately and was completed in several days. The Respondent was paid \$2,000.00 by the Claimant for the work.
5. After the fence posts were installed, the Claimant attached a lightweight mesh fabric to them to use as a privacy fence. Wind could blow through the fabric but it was difficult to see through because of the small holes in the mesh and dark color.

6. The Respondent did not know that the Claimant was going to use a mesh fabric for his fencing material.
7. Within weeks after the posts were installed, they became loose and some of them fell over. Because the posts were loose, the fabric would not stay attached to them.
8. The Claimant contacted the Respondent to correct the problems with the fence. The Respondent initially tried to correct the problem, but his solution was inadequate. The Respondent never corrected the problems with the fence posts.
9. In October 2008, the Claimant hired AA Home Inspections Service, Inc. (AA), to inspect the fence posts. Russell W. Allen, a licensed home improvement contractor with thirty-five years experience, performed the inspection on behalf of AA.
10. None of the fence posts installed by the Respondent were installed correctly. All of the holes were too shallow, only 12 to 18 inches deep; the diameter of the holes was too small; insufficient or no concrete was used in the holes; and no gravel was placed in the bottom of the holes.
11. Correctly installed 4 inch by 4 inch fence posts should be at least 30 inches in the ground in a hole at least 10 inches in diameter. Each hole should have #6 gravel in the bottom of the hole and the rest of the hole must be filled with concrete around the post. The top of each post should be rounded, capped or slanted to help eliminate accumulating water, which can cause rotting.
12. On October 3, 2008, the Claimant filed a claim with the HIC Fund.
13. All of the fence posts installed by the Respondent have to be replaced.
14. The cost to replace the fence posts, including the cost of new posts, is \$3,300.00.



## DISCUSSION

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) (2010). *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 from the Fund.

The Respondent was licensed to perform home improvement work at the time he and the Claimant entered into the contract. Although verbal, the terms of the contract were not disputed. For \$2,000.00, the Respondent was to install thirty-three 4 inch by 4 inch pressure treated wooden fence posts around the perimeter of the Claimant’s property.

The Claimant maintains that the fence posts were not correctly installed. The Claimant installed a mesh fabric to the fence posts to create a privacy fence. Only a few weeks after the posts were installed, they became loose and some even fell over. The Claimant had to keep re-attaching the fabric to the posts because they moved so much the fabric would not stay attached. He even attached cross posts to the fence posts to try to stabilize them, but it did not work. The Claimant alerted the Respondent to the problems and he made an attempt to fix some of the posts by shoring them up with wooden stakes. The attempt was not successful. After that, when the Claimant contacted the Respondent about continuing problems with the fence posts, the Respondent became angry and argumentative. The Respondent never did any more work on the fence posts. The Claimant first got an estimate for having the fence posts replaced. The fence posts were replaced for a total cost of \$3,300.00.

The Respondent contends that he did the best job he could with the fence posts under the circumstances. He agreed to do the job for \$2,000.00, which is half-price, because he was in between projects and he thought he could do the job quickly. He noted that he did not ask for any money from the Claimant until the job was done. The Respondent did not rent any power equipment for the job and the Claimant would not rent any for the job either. The Respondent stated that the ground was full of roots and it was very difficult to dig a hole. He encountered some roots so big that he could not get through them to make the holes deep enough. According to the Respondent, he did not know that the Claimant was going to attach fabric to the fence posts. He attributed most of the problems with the fence posts to the fabric being installed between them and acting as a sail. This put excessive stress on the posts and caused them to loosen and fall over. The Respondent also believed that warping of the pressure treated lumber may also have contributed to the fabric becoming detached from the posts.

Mr. Allen testified that the fence posts were not correctly installed. Correctly installed fence posts should be at least 30 inches in the ground in the Maryland area, due to the depth of the frost line. A hole must be at least 10 inches in diameter and have #6 gravel in the bottom of the hole. The rest of the hole must be filled to the top with concrete around the post. The top of each post should be rounded, capped or slanted to help eliminate accumulating water, which can cause rotting. According to Mr. Allen, he dug up many posts and carefully inspected the others. None of the posts were more than 14 inches in the ground, none had gravel in the hole, and for the few that had concrete in the hole, the amount of concrete was inadequate. He disputed the Respondent's contention that the fabric acted as a sail and caused the posts to become loose. Mr.

Allen explained that all fence posts, no matter what the fencing material will be, must be installed in the same manner. He pointed out that many fences, such as wooden stockade fences, are solid and little, if any, air can flow through them. He also noted that the same methods are used in post and beam buildings, which might have solid walls on all four sides.

Based on the above, I conclude that the Claimant is eligible for compensation from the Fund. The Respondent agreed to install fence posts for the Claimant. He was supposed to be the person with the expertise. He should have been aware of the potential problems with installing fence posts and the correct methods of installing them. Apparently, he was aware of neither. I do not accept the Respondent's contention that the fabric was the cause of the problems with the fence posts. Mr. Allen's testimony was direct, persuasive, and was consistent with common sense. Further, the Respondent did not dispute Mr. Allen's explanation of how to correctly install fence posts or explain what he might have done differently if he knew the fencing material would be mesh fabric. In essence, the Respondent simply did not want to expend the resources necessary to perform the work correctly, which resulted in an inadequate and unworkmanlike home improvement.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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.

Using the formula set forth in COMAR 09.08.03.03B(3)(c), I calculate the Claimant's actual loss as follows:

Amount paid to original contractor	\$2,000.00
Cost to correct or complete	<u>+3,300.00</u>
	5,300.00
Minus original contract price	<u>- 2,000.00</u>
(Actual loss)	\$3,300.00

The loss reflected above is higher than the original cost of the contract because it includes removal of the original fence posts and, it appears, new fence posts. Nevertheless, the cost is lower than that reflected in the proposal from New Image Building & Remodeling, a licensed home improvement contractor, and is within the price range provided by Mr. Allen. It is \$700.00 less than the Respondent claims he should have charged under the original contract. Accordingly, the Claimant is entitled to an award from the Fund in the amount of \$3,300.00.

#### **CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$3,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

#### **RECOMMENDED ORDER**


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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,300.00; and

**ORDER** that the Respondent be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411 (2010); and

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

August 26, 2010  
Date Decision Mailed



James T. Murray  
Administrative Law Judge

JTM/gr  
# 116055

IN THE MATTER OF THE CLAIM OF \* BEFORE JAMES T. MURRAY,  
 FRED BERGNER AGAINST THE \* AN ADMINISTRATIVE LAW JUDGE  
 MARYLAND HOME \* OF THE MARYLAND OFFICE  
 IMPROVEMENT GUARANTY FUND \* OF ADMINISTRATIVE HEARINGS  
 FOR THE ALLEGED ACTS OR \*  
 OMISSIONS OF JAMES MACRI, JR. \* OAH NO.: DLR-HIC-02-09-42931  
 T/A CREATIVE SPACES HOME \* MHIC NO.: 08 (90) 2252  
 IMPROVEMENTS

\* \* \* \* \*

**FILE EXHIBIT LIST**

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Fund Ex. # 3 - Letter from John Borz to the Respondent, October 31, 2008 and Home Improvement Claim Form, October 3, 2008

No exhibits were offered on behalf of the Respondent.

PROPOSED ORDER

*WHEREFORE, this 5th day of October 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.*

*Marilyn Jumalon*

*Marilyn Jumalon  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION