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| <p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF DAVID &amp; MARY CLARK,</b></p> <p><b>CLAIMANTS,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF DAVID KILKEARY,</b></p> <p><b>T/A PINNACLE HOME</b></p> <p><b>IMPROVEMENTS,</b></p> <p><b>RESPONDENT</b></p> | <p><b>* BEFORE KIMBERLY A. FARRELL,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH NO.: DLR-HIC-02-12-26971</b></p> <p><b>* MHIC NO.: 10(75)1107</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> |
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**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 May 11, 2010, David and Mary Clark (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$34,091.10 for actual losses allegedly suffered as a result of a home improvement contract with David Kilkeary t/a Pinnacle Home Improvements (Respondent).

I held a hearing on January 3, 2013, at the Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 &

Supp. 2012). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent was not available to attend in person owing to his incarceration in a federal facility. He did not respond to the notice of hearing which was sent to him via certified mail and which was signed for by an institutional representative. The Respondent did not request a postponement, or seek to participate by telephone, video conferencing or other means. I deemed him to have failed to appear after proper notice. *See*, Md. Code Ann., Bus. Reg. §§ 8-312(h) (2010) (addressing disciplinary hearings for MHIC license holders).

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 Office of Administrative Hearings 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**

The Claimant offered two spiral-bound evidence presentation books which were marked and admitted as CLMT 1 and 2 respectively.<sup>1</sup> They contained the following:

- CLMT #1      Clark Home Improvement Claim
- Claim Summary (page 2)
  - Improvement Overview (page 3)

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<sup>1</sup> The Claimants presented impeccably organized documents. It made a case with a lot of details far easier to manage and I appreciate their efforts.

- 13 full-page reprints of photographs of the home before construction began and after the Respondent ceased working on the project (pages 4 – 16)
- Claim Breakdown (page 17)
- Information on the Respondent (page 18)

**CLMT #2 Claim of David Clark and Mary Clark Against the Home Improvement Commission Guaranty Fund**

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| Tab #21 | Press Clips, Casino Extortion                       |

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

|         |  |
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| FUND #1 | Certified Mail Return Receipt (green card) for the Respondent at FCI Beckley, Federal Correctional Institution, P.O. Box 350, Beaver, West Virginia, 25813 |
| FUND #2 | Proof of mailing the notice of hearing to the Respondent's last known home address (hand-written note that Respondent no longer lives at that address)     |
| FUND #3 | Proof of mailing the notice of hearing to another address once associated with the Respondent (unclaimed)  |
| FUND #4 | Hearing Order, June 12, 2012   |
| FUND #5 | MHIC licensing records for the Respondent  |
| FUND #6 | Affidavit of Thomas Marr IV, October 2, 2012   |
| FUND #7 | Information related to the Respondent  |
| FUND #8 | Home Improvement Claim Form, received at the MHIC May 11, 2012   |
| FUND #9 | Letter from the MHIC to the Respondent, May 14, 2010   |

The Respondent was not present and did not offer any exhibits.

## Testimony

Ms. Clark (Claimant) testified. No other witnesses were called.

## FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a licensed home improvement contractor under MHIC license number # 01-86924.
2. On March 5, 2007, the Claimants and the Respondent entered into a contract for the Respondent to build an addition on the back of the Claimants' home located at 1523 Hornbeam Drive in Crofton, Maryland. The addition was to include a living room, a remodeled and enlarged kitchen, a remodeled family room, a new room (referred to as the bonus room)<sup>2</sup> built off the master bedroom, and a new porch and deck.
3. The original agreed upon contract price was \$167,500.00.
4. On May 30, 2007, the parties agreed that certain additional cabinets would be included in the scope of the Respondent's work. This agreement added \$15,935.00 to the contract price.
5. On June 10, 2007, the parties agreed to an additional change order to expand the scope of the work by enlarging the bonus room, constructing a balcony with a new exterior door on the bonus room, installing a fireplace in the master bedroom, adding an exterior stone chimney, upgrading flooring, relocating HVAC equipment, and adding additional framing, drywall, and crown molding. This change added \$16,550.00 to the contract price, bringing the total agreed contract price including the original contract and the two subsequent addenda to \$199,985.00.

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<sup>2</sup> The room is also referred to in some of the exhibits as a home office.

6. The Claimant made the following payments to the Respondent:

|                   |                 |
|-------------------|-----------------|
| February 14, 2007 | \$ 5,000.00     |
| March 4, 2007     | 10,000.00       |
| March 23, 2007    | 10,000.00       |
| March 27, 2007    | 35,000.00       |
| May 30, 2007      | 15,935.00       |
| June 12, 2007     | 16,550.00       |
| June 22, 2007     | 55,000.00       |
| July 11, 2007     | 15,000.00       |
| July 25, 2007     | 15,000.00       |
| August 30, 2007   | 20,000.00       |
| October 23, 2007  | <u>3,000.00</u> |

Grand Total: \$200,485.00<sup>3</sup>

7. The Respondent worked on the project from May 2007 until November 13, 2007.

The Respondent was working regularly during that period and the Claimant had no reason to expect that he would not finish the job.

8. After leaving the Claimants' home on November 13, 2007, the Respondent drove to Atlantic City, New Jersey, where he engaged in an elaborate scheme aimed at extorting several million dollars from the Showboat Hotel & Casino. Among other things, he used a pellet gun, which appeared to be a semi-automatic handgun, to take hostages, threatened to blow them up with a (fake) suicide bomb he wore on his person, and he threatened to detonate other (fake) bombs he had planted around Showboat property. The effort was not successful and, after a stand-off, the Respondent surrendered to authorities on November 14, 2007. He has been continuously in federal custody since that time.

9. The Respondent eventually pleaded guilty to a three-count indictment and was sentenced to twenty-five years in prison.

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<sup>3</sup> The Claimants came to realize at some point that they had overpaid the Respondent by \$500.00, as the total for the original contract and the two addenda was \$199,985.00.

10. The Claimants' home improvement project was incomplete when the Respondent left the job on November 13, 2007. Primarily, the master bedroom, the balcony off the bonus room, the porch, and the rear entrance steps were unfinished, there were no gutters for any of the newly constructed areas, and there were various other punch-list items incomplete as well.

11. In the master bedroom, no fireplace had been installed, an exterior window was left covered only by insulation, and there was a door missing, leaving an open doorway between the bonus room and the master bedroom.

12. The bonus room balcony was missing siding, railings, and had a flat floor, as opposed to a graded surface; underneath it had exposed electrical wiring and drain pipes that were not connected to any drainage system.

13. The porch and rear entrance were missing steps down to the deck, missing siding, and were not enclosed; in addition, the posts were not wrapped as required with material matching the siding and manufactured to retard weather damage, an exterior door was not installed, and the area was otherwise incomplete.

14. In December 2007, the Claimants paid Baumgardner Construction, an MHIC licensed company, \$1,000 to complete masonry work called for by the contract.

15. Between December 11, 2007 and February 7, 2008, the Claimants spent \$828.04 in cash at Home Depot and Lowes to purchase materials to complete work required by the contract.

16. During that time period, the Claimants also charged \$2,445.13 worth of material to complete work included in the contract.

17. The Claimants' nephew assisted the Claimants in prioritizing which incomplete items needed immediate attention and which could be safely deferred. He also assisted the Claimants in actually doing some of the work. The Claimants have not requested any reimbursement from the Fund for their own labor or for that of their nephew. They have only requested reimbursement for materials needed to complete those projects.

18. On January 9, 2008, the Claimants paid \$2,500.00 to In Home Stone for materials the Respondent obtained from that business for the Claimants' project, but for which In Home Stone had never been paid.

19. On February 6, 2008, the Claimants paid Chesapeake Roofing and Siding, an MHIC licensed company, \$5,347.00 to perform home improvement work the Respondent was obligated to perform under the contract.

20. By February 2008, the Claimants paid an additional \$1,271.07 for materials necessary to complete portions of the Respondent's responsibilities under the contract.

21. On February 26, 2008, the Claimants paid \$500.00 to Donald Shaw Welding for work on the balcony railing which was contemplated by the contract.

22. On March 21, 2008, the Claimants paid Chesapeake Roofing and Siding an additional \$1,350.00 for work done as required by the contract.

23. In June and July 2008 the Claimants charged \$326.91 and \$818.17 for additional supplies and materials to finish portions of the project.

24. The Claimants contracted with Fichtner Services Central, Inc., an MHIC licensed company, to correct and complete the balcony's deck and other balcony and the surrounding area issues. The Claimants made three payments to Fichtner as follows:

\$2,300.00 on August 20, 2008; \$2,383.50 on October 3, 2008; and \$2,383.50 on November 5, 2008.

25. The Claimants paid \$328.00 to Charles C. Taylor, III, a licensed electrician, on November 11, 2008. He completed work called for by the contract.

26. The Claimant's paid Heidler Plumbing, a licensed master plumber, for installing the fireplaces called for in the contract. Heidler was paid as follows: \$891.00 on September 9, 2009; and \$3,568.00 on September 25, 2009.

27. On April 18, 2010, the Claimants paid \$5,500.00 to Holmes Construction, an MHIC licensed company, to build the fireplace surround in the mater bedroom as called for in the June 10, 2007 contract addendum.

28. On April 19, 2010, the Claimants spent \$349.00 at Best Buy to purchase material needed to complete the contract's electrical specifications.

29. The Claimant's actual loss is in excess of the statutory limit of \$20,000.00 for recovery from the Fund.

### 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) (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 Claimants have proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract. Second, the Respondent failed to complete the project. He may also have



performed unworkmanlike or inadequate home improvement, particularly with respect to the pitch of the balcony floor and the drainage problem that ensued. The Respondent's off-the-job criminal activity resulted in his inability to complete the home improvement project as promised. Upon learning that they had been thrust into this unexpected and unwelcome situation, the homeowners scrambled to figure out which issues demanded immediate attention and which could be left to sit. It took them years to finish the project, because they had fully paid the Respondent even though much work was left to be done. Clearly the Claimants are entitled to compensation from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award. 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; the regulations also offer the alternative of resorting to a unique measure of loss if necessary for a fair calculation. COMAR 09.08.03.03B(3). The formula appropriate for the facts of this case is as follows:

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 Claimants' actual loss is determined by taking the amount paid to or on behalf of the Respondent, \$200,485.00, plus the reasonable amounts the Claimants paid to complete the original contract, \$34,091.00. The sum is \$234,576.00. From that sum the original

contract price is deducted (\$234,576.00 – 199,985.00), resulting in an actual loss of \$34,591.00, the amount requested by the Claimants. The Fund argued that the Claimants' actual loss was \$500.00 less, the difference having to do with how to properly account for the extra \$500.00 the Claimants paid the Respondent beyond what was owed in the contracts and addenda. There is no need to finely parse the calculations, because both sides agree that the Claimants' actual loss is in excess of \$30,000.00; however, the Claimants are entitled to only a portion of their actual loss from the Fund. Under the law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (a) and (d) (Supp. 2012). The Claimants paid over \$200,000 to the Respondent, so their compensable loss is capped by the statute at \$20,000.00, which is less than their actual loss.<sup>4</sup>

### **CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual compensable loss of \$20,000 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

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<sup>4</sup> The governing statute provides that the "Commission may not award ... more than \$20,000.00 to one claimant for acts or omissions of one contractor[.]" The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. *Compare* Md. Ann. Code, Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Baltimore Co.*, 414 Md. 265, 276 (2010).

**RECOMMENDED ORDER**

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


**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

**ORDER** that the record reflect 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**

March 11, 2013  
Date Decision Mailed

  
\_\_\_\_\_  
Kimberly A. Farrell  
Administrative Law Judge

KAF  
Document #140823

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**FILE EXHIBIT LIST**

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  - Claim Breakdown (page 17)
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The Respondent was not present and did not offer any exhibits.

PROPOSED ORDER

*WHEREFORE, this 18th 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