

IN THE MATTER OF  
SAMUEL GIORDANO

\* IN THE  
\* CIRCUIT COURT FOR  
\* ANNE ARUNDEL COUNTY  
\* MARYLAND  
\* Case No.: C-02-CV-17-000104

\* \* \* \* \*

**ORDER**

On July 31<sup>st</sup>, 2017, the parties appeared before the Honorable Stacy W. McCormack for a hearing on the Petitioner’s Appeal of the Commission’s Final Order. At that hearing, both parties were heard on the merits of the petition. After considering all of the pleadings filed and arguments made at that hearing, it is this 12<sup>th</sup> day of September, 2017, by the Circuit Court for Anne Arundel County, hereby

ORDERED, the Petitioner’s Request to Reverse and Revise the Commission’s Final Order to \$2,500 is DENIED, and the Commission’s Final Order is AFFIRMED. A Memorandum Opinion accompanies this Order.

**Signature on File**

Signed: 9/12/2017 10:57 AM

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge  
Circuit Court for Anne Arundel County

IN THE MATTER OF  
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\* \* \* \* \*

**MEMORANDUM OPINION AND ORDER**

This opinion addresses the appeal of the Final Order of the Maryland Home Improvement Commission (“Commission”) in the matter of the claim of Respondent, Cesar Camacho (“Camacho”) against Petitioner, Samuel Giordano, trading as Remodel Weks, LLC, (“Giordano”) for final compensation from the Maryland Home Improvement Guaranty Fund (“Fund”). The Petitioner, Giordano, filed their petition on May 30, 2017, requesting that this Court reverse the Commission’s finding that the “actual loss” sustained was \$9,962.00 and revise the “actual loss” determination to \$2,500.00. On July 3, 2017, the Commission filed a responsive petition and requested this Court to affirm the decision of the Commission. On July 31, 2017, the parties appeared before this Court for a hearing on the Petitioner’s Appeal of the Commission’s Final Order. At that hearing, counsel for both parties were heard on the merits of the petition. After considering all of the pleadings filed and arguments made at that hearing, this Court hereby **DENIES** the Petitioner’s request to reverse and revise the Commission’s Final Order to \$2,500.00 and **AFFIRMS** the Commission’s Final Order. <sup>1</sup>

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<sup>1</sup> Initially, it must be noted that the Commission committed a typographic error in (2)(E) of its Final Order. Per this Court’s review and calculations, the actual loss indicated in the Commission’s Final Order should in fact read \$9,692.00. The “amount paid to Respondent” (\$46,706.00) plus the “reasonable cost to repair and complete Respondent’s work” (\$18,811.20) amounts to \$65,517.20. This figure, less the original contract price (\$55,825.00) totals an actual loss of \$9,692.00. Additionally, (D)(1) of the Final Order indicates the purchase price of materials to be \$4,765.00. This too is a typographic error. The correct amount is \$4,765.20. At argument both parties acknowledged these errors.

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IN THE MATTER OF THE ESTATE OF  
JAMES EARL RAY, JR.  
DECEASED  
LAST WILL AND TESTAMENT  
FILED FOR PROBATE  
IN THE COUNTY OF SHELBY, TENNESSEE  
ON 11/15/2011  
BY  
JAMES EARL RAY, JR.  
PERSONAL REPRESENTATIVE  
The undersigned, James Earl Ray, Jr., Personal Representative of the Estate of James Earl Ray, Jr., deceased, do hereby certify that the foregoing is a true and correct copy of the last will and testament of James Earl Ray, Jr., deceased, as the same appears from the records of the County of Shelby, Tennessee, and that the same has been admitted to probate in the County of Shelby, Tennessee, and that the same is now being administered in accordance with the provisions thereof.

11/15/2011  
JAMES EARL RAY, JR.  
PERSONAL REPRESENTATIVE

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of November, 2011.  
JAMES EARL RAY, JR.  
PERSONAL REPRESENTATIVE

## STATEMENT OF FACTS

In 2014, Camacho purchased a house at 411 Newburg Ave, Catonsville, MD 21228. Camacho obtained a mortgage loan from PrimeLending which was insured by the Federal Housing Administration, a portion of which was a rehabilitation loan under section 203(k) of the National Housing Act. On September 15, 2014, Camacho and Giordano entered into contract for home improvement for \$49,500.00. Giordano, trading as Remodel Werks, LLC., is licensed by the Commission as a corporate home-improvement contractor. On September 25, 2014, Bill Evans, the rehabilitation loan consultant for the mortgage loan, prepared a cost estimate and work write up for rehabilitation, formally known as a Specification of Repairs (SOR), which outlined a total contract price of \$55,825.00.<sup>2</sup> From mid-October 2014 to mid-February 2015, Giordano performed home improvement work. Giordano used two (2) subcontractors known to Camacho: CK Mechanical for heating, ventilation, and air conditioning and Williams/Williams & Associates for electrical work. On January 4, 2015, after Mr. Evans approved four (4) payment draws to Giordano totaling \$47,131.00, Camacho provided a punch-list of items to Giordano for remedial work.<sup>3</sup> On January 9<sup>th</sup>, 2015, Mr. Evans conducted his final inspection to approve the fifth (5) and final draw of payment. Mr. Evans determined that the project was completed per the SOR and certified that he carefully inspected the property and had not accepted any work not committed in a workmanlike manner.

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<sup>2</sup> Both parties agree that the correct total SOR contract price is \$55,825.00, although the home-improvement contract entered into by Giordano and Camacho only includes the construction costs portion of the total contract. Construction costs of \$49,500.00 plus fees of \$1,375 (\$875.00 payable to Mr. Evans plus \$500.00 for plumbing, mechanical, and electric) plus a 10% contingency reserve of \$4,950.00 sums to \$55,825.00.

<sup>3</sup> Both Respondent and Petitioner agree that the amount paid to Giordano over the course of the first four (4) draws was \$46,706.00 and not \$47,131.00. This \$425.00 difference is the reason that the Petitioner seeks to not only reverse the Commission's Final Order but to also revise the actual loss to \$2,500.00. This revision reduces the actual loss in Judge Barry's Recommended Order of \$2,925.00 by \$425.00, therefore accommodating for the incorrect value used in Judge Barry's calculations.

On January 17, 2015 however, Camacho filed a supplemental punch-list to the January 11<sup>th</sup> punch-list. Giordano agreed to reimburse Camacho for the purchase of materials in the amount of \$4,765.20 from payments on the home improvement loan. On February 13, 2015, the rehabilitation loan issued a final check, payable to both Camacho and Giordano, in the amount of \$8,694.00. Camacho and Giordano disagreed as to the deficiencies in the home improvement work and thus how to divide the final payment. On March 13, 2015, Camacho filed a complaint with the Commission against Giordano. Subsequently, Camacho deposited the final payment check from the rehabilitation loan without obtaining Giordano's endorsement. Between February and May, Camacho and Giordano, through counsel, exchanged correspondence attempting to come to a resolution, but to no avail. Ultimately, in July of 2015, Camacho paid Williams/Williams & Associates, LLC \$1,520.00 for electrical work and paid CK Mechanical \$897.00 for a mini-split and heat pump system installation.

On June 3, 2016, Judge Barry issued a proposed order to the Commission and determined that Camacho sustained an "Actual Loss" of \$2,925.00. Subsequently, Camacho noted "bare bones" exceptions to the proposed order and requested an Exception Hearing in front of a panel of the Commission. On December 16, 2016, the Commission issued its Final Order and amended the actual loss to \$9,692.20. This timely appeal followed.

#### **STANDARD OF REVIEW**

Under Maryland Rule § 7-209, "unless otherwise provided by law, the Court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above." *See also* Md. Code, State Gov't § 10-222(h). The Court may reverse or modify the agency's decision if any substantial right of the petitioner may have been prejudiced or if the



agency's finding, conclusion, or decision: "(i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the final decision maker; (iii) results from an unlawful procedure; (iv) is affected by any other error of law; (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious." *Id.*

When evaluating an administrative decision, the reviewing court has a limited role. "The administrative agency's decision is considered *prima facie* correct, and an appellate court must view that decision in the light most favorable to the agency." *Dep't of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 406 (1999). The Court reviews the agency's conclusions of law, *de novo*, for correctness. *Schwartz v. Maryland Dep't of Natural Resources*, 385 Md. 534, 554 (2005). When reviewing factual findings, the Court must determine whether there is substantial evidence on the record to support the administrative agency's decision. In applying the substantial evidence test, a reviewing court must decide, "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Motor Vehicle Admin. v. Weller*, 390 Md. 115, 141 (2005) (internal citations omitted).

The Court may not substitute its judgment for that of the agency. "If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact." *Comm'r, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 508 (1977). If the inferences drawn by the administrative agency reasonably follow facts that are shown by direct proof on the record, the Court has no power to disagree, even if the agency may have reasonably drawn a different inference. *Id.*

## ANALYSIS

The present issue before this Court concerns whether the Commission acted within its legal authority in amending the Recommended Order of Administrative Law Judge, the Honorable Robert. F. Barry, by concluding that the additional expenses incurred by Camacho to repair and complete work were “mistakenly omitted” from Judge Barry’s calculation of Camacho’s actual loss. The Petitioner argues that the Commission did not oblige the required deference to Judge Barry’s witness and evidence based credibility determinations and failed to show a substantial basis for concluding that expenses to repair and complete work were “mistakenly omitted.” In turn, the Respondent argues that the Commission did not overturn any witness and evidence based credibility determinations by Judge Barry. Rather, the Respondent maintains that that the Commission merely adopted Judge Barry’s undisputed findings of fact in their calculation of actual loss and thus, was within its discretion to substitute its judgment and render a final decision contrary to that of Judge Barry. In consideration of this Court’s high standard of review under the “substantial evidence” test, and taking into consideration the *Anderson-Shrieves* distinction, this Court hereby DENIES the Petitioner’s request to reverse and revise the Commission’s Final Order to \$2,500.00 and AFFIRMS the Commission’s Final Order.

### **I. Evidentiary Determinations: The *Anderson-Shrieves* Distinction**

The *Anderson-Shrieves* Distinction provides an exception for the deference an agency must give to an ALJ’s findings. *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 396 (2006), *Anderson v. Dep’t of Pub. Safety & Corr. Servs.*, 330 Md. 187 (1993), and *Dep’t of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283 (1994). In *Elliott*, Judge Moylan clarified the relationship between administrative agencies and administrative law judges and reiterated the



courts in *Anderson* and *Shrieves*. “[T]he ALJ’s decision to give or deny credit to a particular witness’ testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body’s source of disagreement with the ALJ.” *Id.* at 385. However, Judge Moylan’s further clarification of the limited application of this exception was unequivocal.

“The Anderson–Shrieves Deference Rule is of limited utility. It is a small wrinkle on the substantial evidence test. It does not apply to an ALJ’s proposed decisions or conclusions of law. It does not apply to an ALJ’s proposed findings of fact that are based on derivative inferences. It does not apply even to the assessment of credibility, when the credibility assessment is not primarily demeanor-based but is based on, as is frequently the case with expert witnesses, technical knowledge or specialized practices that implicate the expertise of the reviewing agency. It does not apply even to demeanor-based credibility findings if the reviewing agency has other substantial evidence supporting its decision to disregard the proposed findings of the ALJ. In the limited circumstances in which it does apply, it still does not necessarily bind the agency. It simply imposes upon the agency the additional burden of articulating a sound reason for not accepting the demeanor-based fact-finding of the ALJ” *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 396, (2006).

Giordano argues that the Commission lacked a substantial basis for rejecting Judge Barry’s credibility based evidentiary determinations. However, the Commission merely adopted the findings of fact stipulated by Judge Barry and in fact, accepted Judge Barry’s sole conclusion based on evidentiary determinations. Judge Barry’s opening analysis evaluated Camacho’s rejection of Giordano’s efforts to resolve the claim. (Recommended Order pg. 17). A determination that Camacho unreasonably rejected Giordano’s good faith efforts to resolve the claim would render the claim legally insufficient. Consequently, an “actual loss” analysis would be a moot matter. <sup>4</sup> Judge Barry noted, “... the resolution of the unreasonable rejection of good faith efforts issue is likely to require testimony and credibility determinations.” *Id.* Ultimately,

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<sup>4</sup> Judge Barry followed the guidelines of COMAR 09.08.03.02D(3)(c):

“The hearing board may dismiss a claim as legally insufficient if the claimant has unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Regs. 09.08.03.02

Judge Barry concluded that Giordano's efforts to resolve the claim were not made in good faith, and even if, *arguendo*, they were, Camacho did not unreasonably reject those efforts. (Recommended Order 21). This finding, based on witness and evidence based credibility determinations, allowed Judge Barry to conclude that the claim was not legally insufficient, prompting an analysis of the "actual loss" value. In its Final Order, the Commission accepts this analysis and resulting conclusion as true but simply disagrees as to how the value of "actual loss" should be calculated. Therefore, the Commission comported with the guidelines set forth in *Elliott*.

## **II. Substantial Evidence Test for "Actual Loss" Calculation**

The crux of the petition before this Court hinges on the words "mistakenly omitted" in the Commission's Final Order. The Petitioner contends that for the Commission to say "mistakenly," indicates that Judge Barry made a miscalculation in determining the "actual loss," whereas Judge Barry's Recommended Order evidences an intentional exclusion of these expenses. On the contrary, it is the Respondent's position that usage of "mistakenly omitted" signifies the Commission's mere disagreement with Judge Barry's application of COMAR 09.08.03.03(B)(3)(C), not an oversight in calculation of the "actual loss." The Commission's interpretation of the formula contrasts with Judge Barry's and therefore, the Commission concluded a "mistake." Considering the totality of circumstances, this Court agrees with the Respondent's intended meaning of "mistakenly omitted."

Actual loss refers to "...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 (West). COMAR 09.08.03.03(B)(3)(c), the governing regulation to determine

“actual loss,” essentially takes the sum of the “*Amount paid to Contractor*” plus “*Amount to correct/complete work,*” less the “*Original contract price.*” Md. Code Regs. 09.08.03.03.<sup>5</sup>

The following analysis will consider solely the basis for the Commission’s Final Order. “When an administrative agency overrules the recommendation of an ALJ, a reviewing court’s task is to determine if the agency’s final order is based on substantial evidence in the record . . . [t]he question is not ‘whether the agency erred’ in overruling the ALJ but whether there is substantial evidence for the agency’s decision. *Dep’t of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302 (1994) quoting (*Kopack v. N.L.R.B.*, 668 F.2d 946, 952 (7th Cir. 1982)).

Bearing in mind this Court’s narrow scope for review of an agency’s decision, this Court merely must find that the Commission’s Final Order passes muster under the substantial evidence test. In the Commission’s Final Order, all values stem directly from Judge Barry’s undisputed findings of fact. Using the aforementioned formula, this Court will reevaluate the Commission’s addition of the amount paid to the Camacho plus the amount to correct and complete Giordano’s work minus the original contract price. The “amount paid to the Respondent” (\$46,706.00) is agreed upon by both parties and not a matter at dispute. However, the amount to correct and complete Giordano’s work is disagreed upon by the Petitioner and Respondent. The Commission adopted Judge Barry’s finding that remedial work totaled \$11,629.00 but also included (1) \$4,756.00 for materials that Camacho paid for, (2) \$1,520.00

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<sup>5</sup> COMAR 09.08.03.03(B)(3)(c):

“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. Md. Code Regs. 09.08.03.03”

paid to Williams/Williams & Associates, LLC, and (3) \$897.00 paid to CK Mechanical, all values from Judge Barry's undisputed findings of fact. (Final Order pg. 2) The Commission is well within its discretion to disagree with the recommendations of Judge Barry as to the inclusion of such costs. By including these costs to the amount that Giordano is responsible for, the Commission avoids an unreasonable benefit to Giordano because the formula already accounts for the amount already paid to the contractor. Lastly, the formula subtracts the original contract price, a matter not at dispute, from the above total value of remedial work. In sum, the Commission had substantial basis for concluding an "actual loss" of \$9,692.20. <sup>6</sup>

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<sup>6</sup> (\$46,706.00 + [\$11,629.00 + \$4,765.20 + \$1,520.00 + \$897.00] - \$55,825.00 = \$9,692.20)



MEMORANDUM

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Subject: [Illegible]

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IN THE MATTER OF THE  
CLAIM OF CESAR CAMACHO,  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED VIOLATIONS  
OF SAMUEL GIORDANO,

Lic. No.: 01-73624

AND

REMODEL WERKS LLC ,

Lic. No. : 05-131501

\* BEFORE ROBERT F. BARRY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: DLR-HIC-02-15-30499  
\* MHIC No.: 15(05)942

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On August 14, 2015, Cesar Camacho (Claimant) filed a claim with the Maryland Home Improvement Commission (Commission) Guaranty Fund (Fund) for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract with Samuel Giordano (Respondent), trading as Remodel Werks LLC.<sup>1</sup> On September 4, 2015, the Commission issued a

<sup>1</sup> The claim was filed in Mr. Camacho's name, and the home improvement contract at issue was signed by Mr. Camacho, but Mr. Camacho's wife, Kendrea Camacho, was actively involved in all aspects of the home improvement contract, the claim against the Fund, and this contested-case hearing. Throughout this decision, unless the context indicates otherwise, I refer to the Camachos jointly as the Claimants.

Hearing Order, and on September 10, 2015, the Commission transmitted the case to the Office of Administrative Hearings (OAH).

On January 21, 2016, I held a hearing at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(a) and (c)(2)(i) (2015). The Claimants, both of whom were present, represented themselves. Attorney Wayne S. Goddard, of Goddard & Associates, LLC, represented the Respondent, who was present. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing, and Regulation, represented the Fund.

The contested-case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); and the Rules of Procedure of the OAH, Code of Maryland Regulations (COMAR) 28.02.01, govern procedure in this case.

### ISSUES

1. Did the Claimants unreasonably reject the Respondent's good faith efforts to resolve the Claimants' claim against the Fund?
2. Did the Claimants sustain an actual loss as a result of the Respondent's acts or omissions in connection with a home improvement contract?

### SUMMARY OF EVIDENCE

#### Exhibits

Except as noted, I admitted the following exhibits into evidence on behalf of the

#### Claimants:

CLAIM #1 - E-mail from the Claimants to the Respondent, September 10, 2014, with 411 Newburg Renovation Ideas

CLAIM #2 - Renovation Proposal/Contract, signed by the Claimants on September 14, 2014



- CLAIM #3 - Specification of Repairs (SOR), ICM Enterprises, Inc.
- CLAIM #4 - E-mails between the Claimants and ICM Enterprises, Inc., September 15, 16, and 25, 2014
- CLAIM #5 - Escrow Holdback Approval Form
- CLAIM #6 - E-mail from the Claimants to the Respondent, October 12, 2014
- CLAIM #7 - E-mail from the Claimants to ICM Enterprises, Inc., October 22, 2014
- CLAIM #8 - E-mail from the Claimants to the Respondent, October 23, 2014
- CLAIM #9 - E-mail from the Claimants to the Respondent, October 23, 2014
- CLAIM #10 - E-mail from the Claimants to the Respondent, November 2, 2014
- CLAIM #11 - E-mail from the Claimants to the Respondent, November 10, 2014
- CLAIM #12 - E-mail from the Claimants to the Respondent, November 10, 2014
- CLAIM #13 - E-mail from the Claimants to the Respondent, November 10, 2014
- CLAIM #14 - E-mail from the Claimants to the Respondent, November 11, 2014
- CLAIM #15 - E-mail from the Claimants to the Respondent, November 12, 2014
- CLAIM #16 - E-mail from the Claimants to the Respondent, November 17, 2014
- CLAIM #17 - E-mail from the Claimants to the Respondent, November 18, 2014
- CLAIM #18 - E-mail from the Claimants to the Respondent, December 2, 2014
- CLAIM #19 - E-mail from the Claimants to the Respondent, December 10, 2014
- CLAIM #20 - E-mails between the Claimants and ICM Enterprises, Inc., December 11 and 12, 2014
- CLAIM #21 - E-mail from the Claimants to the Respondent, January 4, 2015, with Punch List – 411 Newburg, January 4, 2015
- CLAIM #22 - E-mail from ICM Enterprises, Inc. to the Claimants, January 5, 2015
- CLAIM #23 - E-mail from the Claimants to the Respondent, January 13, 2015

- CLAIM #24 - E-mail from the Claimants to the Respondent, January 17, 2015, with Punch List – 411 Newburg, January 11, 2015
- CLAIM #25 - E-mail from the Claimants to the Respondent, January 20, 2015
- CLAIM #26 - E-mail from the Claimants to the Respondent, January 24, 2015
- CLAIM #27 - E-mail from the Claimants to the Respondent, January 27, 2015
- CLAIM #28 - E-mail from the Claimants to the Respondent, January 30, 2015
- CLAIM #29 - E-mail from the Claimants to the Respondent, January 30, 2015
- CLAIM #30 - E-mail from the Claimants to the Respondent, February 7, 2015
- CLAIM #31 - E-mail from the Claimants to the Respondent, February 19, 2015
- CLAIM #32 - E-mail from the Claimants to the Respondent, February 22, 2015
- CLAIM #33 - Certified Mail Receipts, February 8 and 25, 2015
- CLAIM #34 - Inspection Report, John J. Heyn, JHH Consultant, April 8, 2015, with photographs
- CLAIM #35 - (not offered)
- CLAIM #36 - Renovation Proposal/Contract, Loop Construction, Inc., June 6, 2015
- CLAIM #37 - Contract, J.K. Eareckson & Co. Hardwood Floors, June 10, 2015
- CLAIM #38 - (not admitted)
- CLAIM #39 - Receipts: The Home Depot, Lowe's Home Centers, and Sherwin Williams

I admitted the following exhibits into evidence on behalf of the Respondent:

- RESP #1 - Renovation Proposal/Contract, signed by the Claimants and the Respondent on September 15, 2014
- RESP #2 - Draw Request, HUD 203k, U.S. Department of Housing and Urban Development;
- Request for Acceptance of Changes in Approved Drawings and Specifications;
- Lien Waiver and Release

- RESP #3 - Mortgagor's Letter of Completion, January 9, 2015
- RESP #4 - List of Extras and Other Extras
- RESP #5 - Letter from the Respondent to the Claimants in response to an e-mail on February 19, 2015
- RESP #6 - Letter from the Respondent's attorney to the Claimants, April 24, 2015
- RESP #7 - Letter from the Claimants to the Respondent's attorney, April 30, 2015
- RESP #8 - Letter from the Respondent's attorney to the Claimants, May 7, 2015
- RESP #9 - Photograph of Claimants' addition
- RESP #10 - Photograph of Claimants' kitchen
- RESP #11 - Photograph of Claimants' hardwood floors
- RESP #12 - Photograph of Claimants' bathroom
- RESP #13 - Photograph of Claimants' bathroom
- RESP #14 - Photograph of Claimants' bathroom
- RESP #15 - Photograph of Claimants' hardwood floors
- RESP #16 - Photograph of Claimants' bathroom
- RESP #17 - Photograph of Claimants' stairway
- RESP #18 - Photograph of Claimants' basement, with water heater
- RESP #19 - Photograph of Claimants' bathroom
- RESP #20 - Photograph of Claimants' bathroom
- RESP #21 - Photograph of Claimants' addition
- RESP #22 - Photograph of Claimants' addition
- RESP #23 - Image of and information about split escutcheon for bathroom sink base
- RESP #24 - Photograph of Claimants' kitchen (before home improvement contract)

I admitted the following exhibits into evidence on behalf of the Fund:

- FUND #1 - Hearing Order, September 4, 2015
- FUND #2 - Respondent's licensing history with the Commission, January 19, 2016
- FUND #3 - Letter from the Commission to the Respondent, August 24, 2015, with Home Improvement Claim
- FUND #4 - Voucher for Payment from PrimeLending to the Claimants and the Respondent, February 13, 2015
- FUND #5 - Spreadsheet – Cost Breakdown Detail
- FUND #6 - Photocopies of checks from the Claimants to Loop Construction, Inc.: June 12 and 23, 2015, and July 2, 2015
- FUND #7 - Electrical Contractor Invoice, Williams/Williams & Associates, LLC, January 23, 2015, with photocopy of check from the Claimants to Williams/Williams & Associates, LLC, July 3, 2015
- FUND #8 - Invoice, CK Mechanical, January 23, 2015, with photocopy of check from the Claimants to CK Mechanical, July 10, 2015
- FUND #9 - Receipts for materials purchased by the Claimants from Southern Sales Services; The Home Depot; Lowe's Home Centers; and Wayfair.com
- FUND #10 - Photocopy of check from the Claimants to J.K. Eareckson & Co. Hardwood Floors, June 29, 2015

Testimony

Kendrea Camacho testified for the Claimants. The Claimants also presented testimony from John J. Heyn, JHH Consultant, who testified as an expert witness in home inspection, remodeling, and cost estimation.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

## FINDINGS OF FACT

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

1. The Respondent has been licensed by the Commission as an individual home improvement contractor under registration number 01-73624 since April 7, 1999. (FUND #2).
2. The Respondent is the individual in responsible charge of home improvement work performed by Remodel Werks LLC., which is licensed by the Commission as a corporate home-improvement contractor under registration number 05-131501. (FUND #2).
3. In 2014, the Claimants purchased a house located at 411 Newburg Avenue, Catonsville, Maryland 21228.
4. The Claimants obtained a mortgage loan from PrimeLending. The mortgage loan was insured by the Federal Housing Administration (FHA), and at least a portion of the mortgage loan was a rehabilitation loan under section 203(k) of the National Housing Act.
5. Bill Evans of ICM Enterprises, Inc., acted as the rehabilitation loan consultant for the mortgage loan. Mr. Evans was responsible, in part, for preparing a cost estimate and work write-up for the rehabilitation and conducting a plan review. *See* 24 Code of Federal Regulations (CFR) § 203.50(l) (2015).
6. On September 15, 2014, the Claimants and the Respondent entered into a home improvement contract for \$49,500.00. (RESP #1; CLAIM #2).
7. On September 25, 2014, following an inspection on September 13, 2014, Mr. Evans prepared a cost estimate and work write-up for the rehabilitation, known as a Specification of Repairs (SOR), which provided for a total contract price of \$55,825.00, with construction costs of \$49,500.00; fees of \$1,375 (draw fees of \$875.00 payable to Mr. Evans and permit fees

for plumbing, electrical, and mechanic of \$500.00); and a ten-percent contingency reserve of \$4,950.00 (CLAIM #3).<sup>2</sup>

8. The rehabilitation loan included an escrow holdback approval, which required the rehabilitation to be completed by December 24, 2014 (with a "drop dead date" of January 8, 2015), with extension fees charged to the Claimants based on a percentage of a total loan of \$316,329.00 due if the rehabilitation was not completed on time: 30 days - \$1,185.00; 60 days - \$2,370.00; and 90 days - \$4,740.00. (CLAIM #5).

9. The escrow holdback approval also required periodic draws against the escrow account as rehabilitation work progressed. Mr. Evans was required to conduct draw inspections for the release of funds during the construction phase of the rehabilitation. *See* 24 CFR § 203.50(l) (2015).

10. The Claimants closed on their mortgage loan on or about September 25, 2014.

11. The Respondent performed home-improvement work on the Claimants' house between mid-October 2014 and mid-February 2015.

12. The Respondent agreed to use two subcontractors that were known to the Claimants: CK Mechanical for heating, ventilation, and air conditioning (HVAC), and Williams/Williams & Associates, LLC for electrical work.

13. Between late September 2014 and early January 2015, Mr. Evans approved four draws for payment to the Respondent totaling \$47,131.00.<sup>3</sup>

14. On January 4, 2015, the Claimants provided the Respondent a punch list of items that the Claimants wanted the Respondent to remedy. The punch list included items, mostly

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<sup>2</sup> At the hearing, the parties agreed that the correct total contract price was the \$55,825.00 total in the SOR. The home-improvement contract between the Claimants and the Respondent included only the construction costs portion of the total contract.

<sup>3</sup> This is the amount that the parties agreed to at the hearing. It differs slightly from the \$47,340.00 reported by Mr. Evans when he conducted his inspection for approval of the fifth draw. (RESP #2).

finishing and painting, in the living room, kitchen, second-floor hallway, main bathroom, Claimants' son's bedroom, master bedroom, small bedroom, basement, basement bathroom, basement room, and the addition. In an e-mail accompanying the punch list, the Claimants noted uneven tile on floors and in showers. (CLAIM #21).

15. On January 9, 2015, Mr. Evans conducted his inspection for approval of the fifth (final) draw. The Claimants and the Respondent certified that “[a]ll completed work has been done in a workmanlike manner.” Mr. Evans certified that he carefully inspected the property and that he had “not accepted any work that is not yet completed in a workmanlike manner.” Mr. Evans recommended that the rehabilitation escrow funds be released for the completed work. Mr. Evans noted that the project had been completed per the SOR, but that some additional electrical and plumbing work, which the Claimants were self-funding, had to be completed.<sup>4</sup> (RESP #2).

16. On January 9, 2015, the Claimants certified to PrimeLending that the rehabilitation construction or improvements, as outlined in the rehabilitation loan agreement had “been completed in a workmanlike manner to my/our satisfaction.” The Claimants requested distribution of the funds remaining in the rehabilitation escrow account, including the balance of the contingency reserve and inspection and miscellaneous fees. (RESP #3).

17. On January 17, 2015, the Claimants provided the Respondent another punch list, dated January 11, 2015, of items that the Claimants wanted the Respondent to remedy. The punch list added additional items to the prior punch list. (CLAIM #24).

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<sup>4</sup> The draw request document indicates that the rehabilitation cost for the fifth draw was \$2,160.00 (\$49,500.00 less \$47,340.00), but the parties and Mr. Evans also agreed to a request for acceptance of a change to the SOR in the amount of \$1,450.00 to add painting of the entire interior, rather than priming only. (RESP #2). At the hearing, the parties did not explain the significance of this change.

18. As of January 24, 2015, the Claimants hoped to move into their house during the first week of February 2015. (CLAIM #26).

19. On or about January 28, 2015, the Respondent's employees damaged the Claimants' garage door after trying to open the door after the Claimants had disengaged power to the garage door opener. The Respondent agreed to pay for repairs to the garage door. (CLAIM #28).

20. On February 7, 2015, the Claimants informed the Respondent that he had to complete the work on the punch list by February 13, 2015. The Claimants also requested reimbursement of more than \$4,000.00 for materials purchased by the Claimants to perform work contained in the SOR. The Respondent had agreed to reimburse the Claimants for those materials from the payments from the draws. The Claimants indicated that if work was not completed by February 13, 2015, that they would have: "no further recourse than to bar you and your agents from the property, hire another contractor to complete the project, seek legal counsel, and file grievance with [the Commission] seeking full restitution and damages." (CLAIM #30).

21. Between approximately December 10, 2014 and January 5, 2015, the Claimants purchased materials for a total of \$4,765.20, for which the Respondent had agree to reimburse the Claimants from the payments on the rehabilitation loan:

|                      |            |
|----------------------|------------|
| Southern Sales -     | \$1,305.92 |
| The Home Depot -     | \$2,485.21 |
| The Home Depot -     | \$368.40   |
| Lowe's Home Center - | \$324.26   |



Lowe's Home Center - \$166.42

Wayfair.com - \$114.99

(FUND #9).

22. Between January 4, 2015 and approximately February 13, 2015, the Respondent, mainly by his employee, Scott Woodall, performed some work on the punch list items.

23. On February 13, 2015, PrimeLending issued a final payment check, payable to the Claimants and the Respondent, in the amount of \$8,694.00.<sup>5</sup> (FUND #4).

24. The Claimants did not have to pay any penalty for missing the completion date and the "drop dead date" in their rehabilitation loan agreement.

25. The Claimants held this final payment check until they electronically deposited it, without obtaining the Respondent's endorsement, into their own account in July or August 2015.

26. On February 19, 2015, the Claimants again wrote to the Respondent. In this letter, the Claimants listed additional deficiencies with the Respondent's home improvement work, including no final plumbing certification, debris in the garage, unvented exhaust fan in basement, and unfinished and mismatched finish on hardwood floors. The Claimants barred the Respondent from their house and asked the Respondent to meet them to endorse the final payment check, which the Claimants would then use to reimburse themselves for materials they had purchased and to pay the HVAC and electrical subcontractors, with the balance going to the Respondent. (CLAIM #31).

27. The Respondent responded to the Claimants' offer. The Respondent indicated that, by agreement with the Claimants, he had performed extra work totaling \$4,120.00. As to the

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<sup>5</sup> The parties did not provide any explanation for the amount of this payment, except to agree that it represented the difference between the total contract amount of \$55,825.00 and the \$47,131.00 that had already been paid from the rehabilitation escrow account to the Respondent. This amount likely included the contingency amount and possibly some holdbacks from other draws.

final payment due, the Respondent agreed that the Claimants could keep \$2,500.00 for materials purchased by the Claimants, that \$2,500.00 could go to the HVAC and electrical subcontractors, and that the balance would go to the Respondent. The Respondent agreed to remove debris and he indicated that the final plumbing certification was held up because the Claimants, outside of the SOR, had installed a new water heater that was not on the permit obtained by the Respondent's plumbing subcontractor. The Respondent did not address the exhaust fan or hardwood floor issues. (RESP #5, RESP #6).

28. On February 22, 2015, the Claimants rejected the Respondent's offer. The Claimants again cited the more than \$4,000.00 in materials they had purchased. (CLAIM #32).

29. On March 13, 2015, the Claimants filed a complaint against the Respondent with the Commission.

30. On March 24, 2015, Mr. Heyn inspected the home-improvement work performed by the Respondent. (CLAIM #34)

31. On April 8, 2015, Mr. Heyn submitted a report of his inspection to the Claimant. He found deficiencies in several areas: (1) poor, uneven floor refinishing, with dust and grime in surface and joints not stained; (2) uneven, inadequate ceramic tile work in the basement and upstairs bathrooms; (3) poor finishing and painting work on walls throughout the house, with cracks and blistering evident; (4) poor finishing and painting work on ceilings throughout the house; (5) improper piecing of molding; (6) basement fan not vented to the outside; (7) interior door to the garage needing self-closing hardware; (8) damaged garage door<sup>6</sup>; (9) debris in the garage; (10) missing or incorrect hardware for kitchen cabinets; and (11) plumbing work without a final certification from Baltimore County. (CLAIM #34).

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<sup>6</sup> The door was damaged as described above, but is not part of this claim because consequential damages are not reimbursable from the Fund. COMAR 09.08.03.03B(1).

32. Using the HomeTech Remodeling and Renovation Cost Estimator and the SOR, Mr. Heyn estimated that it would cost \$15,609.00 to repair the work performed by the Respondent:

|   |                   |
|---|-------------------|
| Hardwood floor refinishing -            | \$3,000.00        |
| Ceramic tile work -                     | \$1,000.00        |
| Finishing and painting work, walls -    | \$2,500.00        |
| Finishing and painting work, ceilings - | \$1,500.00        |
| Molding -                               | \$500.00          |
| Basement fan vent -                     | \$800.00          |
| Interior garage door hardware -         | \$300.00          |
| Debris removal -                        | \$500.00          |
| Install hardware for kitchen cabinets - | \$300.00          |
| Plumbing certification -                | <u>\$2,500.00</u> |
|   | \$12,900.00       |
| 10% Overhead -                          | <u>\$1,290.00</u> |
|   | \$14,190.00       |
| 10% Profit -                            | <u>\$1,419.00</u> |
|   | \$15,609.00       |

(CLAIM #34).

33. The Respondent's performance on the home improvement contract was unworkmanlike in regards to the hardwood floor refinishing, the ceramic tile work, the finishing and painting work (both walls and ceilings), the molding, and the basement fan.

34. The hardwood floors had dust and grime sealed into the finish, uneven coloration in the finish, and unstained sections in the joints of the hardwood.

35. The ceramic tile work in one of the bathrooms was uneven and poorly grouted, creating the possibility of water leaking into the wall behind the bathroom.

36. At least some of the finishing and painting work on walls and ceilings was uneven and needed to be redone. Molding in more than one place was improperly pieced together, and the basement fan was not vented to the outside.

37. The Respondent's performance on the home improvement contract was not unworkmanlike in regards to the debris, kitchen cabinet hardware, and the plumbing certification.

38. In February 2015, there was debris left in the Claimants' garage but some of that debris likely was attributable to other work that the Claimants were having done. The Respondent installed hardware on kitchen cabinets.

39. The plumbing work performed by the Respondent's plumbing contractor was certified as the rehabilitation project proceeded. The inspector for Baltimore County would not issue a final certification because the permit obtained by the Respondent's plumbing contractor did not include a water heater that the Claimants had installed. Contrary to Mr. Heyn's report, there was no need to deconstruct any plumbing installed pursuant to the rehabilitation contract.

40. In April 2015, the Claimants and the Respondent participated in mediation, but did not reach a settlement.<sup>7</sup>

41. On April 24, 2015, the Respondent's attorney wrote a letter to the Claimants, requesting that they permit he and the Respondent to return to the Claimants' house "for

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<sup>7</sup> I prohibited the parties from discussing the contents of the mediation discussions. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-1801 - 3-1806 (2013 & Supp. 2015) (Maryland Mediation Confidentiality Act - unless the participants in the mediation and the mediator agree in advance of the mediation to exclude mediation communications from the Act's requirements, neither the mediator nor any person participating in the mediation may disclose mediation communications in any administrative proceeding). The parties did not present any evidence concerning the agreement to mediate.

purposes of inspecting [with Mr. Heyn] the areas of concern and thereafter formulating a plan to complete, correct and cure the conditions you find unsatisfactory.” (RESP #6).

42. On April 30, 2015, the Claimants rejected the Respondent’s attorney’s offer: “At this point, due to their poor/defective workmanship and our complete loss of confidence in [Respondent], we feel that they have left us with no other recourse than to pursue remediation through the Maryland Home Improvement Commission.” The Claimants indicated that they would listen to offers, apparently financial, that did not require the Respondent to return to their house. (RESP #7).

43. On May 7, 2015, the Respondent’s attorney wrote a letter to the Claimants, in which he again requested an opportunity for the Respondent to inspect and correct defects or deficiencies in the Respondent’s home improvement work. (RESP #8).

44. On June 6, 2015, the Claimants entered into a home improvement contract with Loop Construction, Inc. for \$7,075.00 to perform work on the second-floor bathroom, to repair and paint in the living room, dining room, three bedrooms, and kitchen, and to install self-closing hinges on an interior garage door. (CLAIM #36).

45. The Claimants paid Loop Construction, Inc. a total of \$7,076.00 in three checks, dated June 6, 2015 (\$2,500.00 deposit); June 18, 2015 (\$2,288.00 second payment); and June 30, 2015 (\$2,288.00 final payment). (FUND #6).

46. On June 10, 2015, the Claimants entered into a home improvement contract with J.K. Eareckson & Co. Hardwood Floors for \$2,489.00 to sand and finish 800 square feet of hardwood floors with one coat of sealer and two coats of polyurethane; to sand and finish treads and riser with one coat of sealer and two coats of polyurethane; and to scrape paint off of riser. (CLAIM #37).

47. The Claimants paid J.K. Eareckson & Co. Hardwood Floors \$2,489.00 by an undated check, which was posted to the Claimants' account on June 29, 2015. (FUND #10).

48. In June and July 2015, the Claimants purchased \$1,264.11 of materials from The Home Depot, Lowe's Home Center Inc., and Sherwin-Williams to complete repairs to the Respondent's work. (CLAIM #39).

49. On July 3, 2015, the Claimants paid Williams/Williams & Associates, LLC \$1,520.00 for electrical work performed on or before January 12, 2015. (FUND #7).

50. On July 10, 2015, the Claimants paid CK Mechanical \$897.00 for installing a mini-split and heat pump system on or before January 23, 2015. (FUND #8).

### DISCUSSION

#### Fund Claim

A homeowner 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) (2015). An "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 (2015). But the Commission may deny a claim if it finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

A claimant has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015). In the circumstances presented here, the Claimants have the burden to establish that: (1) the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement; (2) the Claimants had an actual loss due to the costs of restoration, repair, or replacement of the home improvement; and (3) the Claimants did not unreasonably reject the

Respondent's good faith efforts to resolve the claim. As explained below, I find that the Claimants met their burden on each point, although their award is much less than the amount requested in their claim.

Respondent's good faith efforts to resolve the claim

The Commission may deny a claim if it finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015). By statute, the Commission shall review a claim and any response to it and may investigate the claim. Md. Code Ann., Bus. Reg. § 8-407(c)(1) (2015). On the basis of its review and any investigation, the Commission may set the matter for a hearing or dismiss the claim if the claim is, in pertinent part, legally insufficient. Md. Code Ann., Bus. Reg. § 8-407(c)(2) (2015). The Commission's regulations provide that a Commission hearing board, upon consideration of the claim, any response from the contractor, and any response by the claimant to the contractor's response, "may dismiss a claim as legally insufficient if the claimant has unreasonably rejected good faith efforts by the contractor to resolve the claim." COMAR 09.08.03.02D(3)(c). The regulation indicates that the unreasonable rejection of good faith efforts by the contractor to resolve the claim makes the claim legally insufficient. The statute and regulation, neither of which mentions a hearing, create some ambiguity whether the matter of unreasonable rejection of good faith efforts is solely a hearing board issue before a hearing, or part of a contested-case hearing. I find that the statute itself provides sufficient authority for me to review whether the Claimants rejected good faith efforts by the Respondent to resolve the claim, and to dismiss the claim if they did. As in this case, the resolution of the unreasonable rejection of good faith efforts issue is likely to require testimony and credibility determinations.

For those cases that a hearing board cannot decide the issue on written submissions, the unreasonable rejection of good faith efforts issue can only be resolved at a hearing.

Both the Respondent and the Fund asserted that the Claimants rejected the Respondent's good faith efforts to resolve the claim, and moved that I dismiss or deny the Claimants' claim. The Claimants argued that they were justified in rejecting the Respondent's efforts to resolve the claim because by the time those efforts were made the Claimants had lost confidence in the Respondent's ability to complete the home improvement work. The Claimants asked me not to focus on the events after February 2015, including the letters from the Respondent's attorney, but to look at the entire relationship between the Claimants and the Respondent.

The Claimants' concerns about the Respondent's work began almost immediately as the Respondent apparently performed only some demolition work on the Claimants' house during several weeks after the closing on the rehabilitation loan on September 25, 2014. (CLAIM #7 and CLAIM #8). Even when the Respondent started performing work, the Claimants were concerned about a lack of communication and coordination between the Respondent and the HVAC and electrical subcontractors brought in by the Claimants. (CLAIM #11). At the hearing, Ms. Camacho testified that she only saw two of the Respondent's employees, Scott Woodall and Brian Higgs, consistently working on her house. She also testified that as the scheduled completion date of December 24, 2014 drew near she became concerned that the Respondent had not ordered materials that were scheduled to be installed and had not shared with her his plans for the addition to the house and for a ceiling and other areas where drywall could not be installed due to existing pipes for radiant heat. (CLAIM #14 and CLAIM #15).

The Claimants wrote many e-mails to the Respondent, who often did not respond, but would meet on occasion with the Claimants to address their concerns. The Claimants expressed



their concerns about a completion date to Mr. Evans on December 12, 2014. (CLAIM #20). On January 4, 2015, the Claimants provided the Respondent a punch list of items that the Claimants wanted the Respondent to remedy. The punch list included items, mostly finishing and painting, in the living room, kitchen, second-floor hallway, main bathroom, Claimants' son's bedroom, master bedroom, small bedroom, basement, basement bathroom, basement room, and the addition. (CLAIM #21). On January 9, 2015, during Mr. Evans' inspection for approval of the final draw, the Claimants and the Respondent certified that all completed work had been done in a workmanlike manner. On January 9, 2015, the Claimants certified to PrimeLending that the rehabilitation construction or improvements, as outlined in the rehabilitation loan agreement had "been completed in a workmanlike manner to my/our satisfaction." (RESP #3). At the hearing, the Respondent asserted that the Claimants' statements to Mr. Evans and to PrimeLending were evidence of the Respondent's workmanlike performance. In context, I believe that the Claimants, as evidenced by the punch list, were not satisfied with the Respondent's work, but signed off for the rehabilitation loan to avoid extension fees.

In April 2015, the Claimants and the Respondent participated in mediation, but did not reach a settlement. On April 24, 2015, the Respondent's attorney wrote a letter to the Claimants, requesting that they permit he and the Respondent to return to the Claimants' house "for purposes of inspecting [with Mr. Heyn] the areas of concern and thereafter formulating a plan to complete, correct and cure the conditions you find unsatisfactory." (RESP #6). On April 30, 2015, the Claimants rejected the Respondent's attorney offer: "At this point, due to their poor/defective workmanship and our complete loss of confidence in [Respondent], we feel that they have left us with no other recourse than to pursue remediation through the Maryland Home Improvement Commission." The Claimants indicated that they would listen to offers, apparently

financial, that did not require the Respondent to return to their house. (RESP #7). On May 7, 2015, the Respondent's attorney wrote a letter to the Claimants, in which he again requested an opportunity for the Respondent to inspect and correct defects or deficiencies in the Respondent's home improvement work. (RESP #8). The Respondent and the Fund relied on this exchange of letters and argued that the Claimants unreasonably rejected the Respondent's offer to resolve the claim. I disagree because I am satisfied that by April 2015, the Claimants were justified in not wanting the Respondent to return to their house. I am also not convinced that the Respondent acknowledged the extent of his unworkmanlike performance or intended in good faith to remediate his poor work.

There is no real guidance as to what good faith efforts to resolve a claim are or when a homeowner justifiably can say that they no longer want to allow a contractor into their home. I am not inclined to focus so much on the Respondent's attorney's letters because that ignores the Respondent's inability to deal with the Claimants' concerns as expressed in their e-mails and punch lists in December 2014 and January and February 2015. The Respondent missed the deadline and the "drop dead date" in the rehabilitation loan agreement and he appears to have understaffed this home improvement project. Some of the Respondent's work appears to be workmanlike and adequate, such as the work on the addition and the kitchen, (RESP #9, RESP #11, and RESP #22), but other work, as noted by Mr. Heyn, is unsightly or non-functional. The Respondent also missed the deadlines set for work on the punch list; by February 19, 2015, the Claimants had no reason to believe that the Respondent could complete their home improvement project. The involvement of the Respondent's attorney in April does not change anything.

By the letters, the Respondent offered to inspect his own work along with Mr. Heyn and to cure any agreed-upon deficiencies. But Mr. Heyn had already pointed out obvious deficiencies

with the Respondent's work, especially the finishing on the hardwood floors, the problems with the ceramic tile, and the problems with the painting. The Respondent never agreed that there were deficiencies with this work. At the hearing, the Respondent testified that any problems with the hardwood floors and tile were due to choices made by the Claimants, and he never addressed the painting. I simply do not believe on this record that the Respondent ever would have agreed to refinish the hardwood floors, redo the ceramic tile in the bathroom, and repaint the interior of the house, all of which would have been costly. The Respondent never to my satisfaction acknowledged the extent of his unworkmanlike performance or agreed to repair these substantial deficiencies. His offer to resolve the claim was really no more than him being willing to do some minor repairs. I do not find his efforts to resolve the claim were made in good faith.<sup>8</sup>

Unworkmanlike, inadequate, or incomplete home improvement

The Respondent's performance on the home improvement contract was unworkmanlike in regards to the hardwood floor refinishing, the ceramic tile work, the finishing and painting work (both walls and ceilings), the molding, and the basement fan. The hardwood floors had dust and grime sealed into the finish, uneven coloration in the finish, and unstained sections in the joints of the hardwood. At the hearing the Respondent testified that the Claimants did not want the hardwood floors to be puttied and refinished because she wanted the floors to have a "distressed" look. Ms. Camacho conceded that she liked the "character" of the old wood floors. The home improvement contract does not contain any limiting language on the Respondent's performance on the hardwood floors, and there is no excuse for the workmanship on the

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<sup>8</sup> As noted above, the Claimants held the final payment check until they electronically deposited it, without obtaining the Respondent's endorsement, into their own account in July or August 2015. Obviously, the Claimants should not have done that, but their misconduct does not prove that they rejected the Respondent's good faith offers to resolve the claim. It just proves that neither party has entirely clean hands. Ultimately, the Claimants' misconduct will significantly reduce their award from the Fund because they did not pay the Respondent the full amount of the contract.

hardwood floors as there is no reason to have dust and grime in the finish or to have unstained joints. The ceramic tile work in one of the bathrooms is uneven and poorly grouted, creating the possibility of water leaking into the wall behind the bathroom. At the hearing, the Respondent testified that he attempted to dissuade the Claimants from using architectural tiles in this bathroom because it was difficult to install with a waterproof barrier. The home improvement contract does not contain any limiting language on the Respondent's performance on the ceramic tile, and the tiles are not functional. At least some of the finishing and painting work on walls and ceilings is uneven and needed to be redone. Molding in more than one place was improperly pieced together, and the basement fan was not vented to the outside.

The Respondent's performance on the home improvement contract was not unworkmanlike in regards to the debris, kitchen cabinet hardware, and the plumbing certification. In February 2015, there was debris left in the Claimants' garage but some of that debris likely was attributable to other work that the Claimants were having done. The Respondent installed hardware on kitchen cabinets. The plumbing work performed by the Respondent's plumbing contractor was certified as the rehabilitation project proceeded. The inspector for Baltimore County would not issue a final certification because the permit obtained by the Respondent's plumbing contractor did not include a water heater that the Claimants had installed. Contrary to Mr. Heyn's report, there was no need to deconstruct any plumbing installed pursuant to the rehabilitation contract.

Actual loss due to the costs of restoration, repair, or replacement

COMAR 09.08.03.03B, which governs the calculation of awards from the Fund, provides, in pertinent part, as follows:

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:

...

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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.

(4) The Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.

COMAR 09.08.03.03B.

The parties did not make this calculation easy. The rehabilitation loan process, the non-contractual agreements between the Claimants and the Respondent and the Claimants' purchase of materials made for a complicated calculation. The Fund was the only party that addressed the regulatory formula for an award from the Fund. The Fund agreed that the Claimants paid the Respondent \$47,131.00. The Fund suggested that the reasonable amount paid by the Claimants to repair the Respondent's deficient work under the contract was \$16,747.00 (rounded down by twenty cents). The Fund included in this amount \$7,076.00 paid to Loop Construction, Inc.; \$2,489.00 paid to J.K. Eareckson & Co. Hardwood Floors; \$1,520.00 paid to Williams/Williams & Associates, LLC; \$897.00 paid to CK Mechanical; and \$4,765.20 that the Claimants spent on materials in December 2014 and January 2015. The Fund did not include \$1,264.21 that the Claimants spent for materials in June and July 2015. The Fund suggested that the amount of the contract was either \$55,825.00 or \$59,945.00 if I included the additional work that the Respondent performed pursuant to a verbal agreement with the Claimants. The Fund ultimately suggested an award of \$3,933.00 ( $\$47,131.00 + \$16,747.00 = \$63,878.00$  less  $\$59,945.00$ ).

I share the Fund's uncertainty on the components of the formula. The verbal agreement between the Claimants and the Respondent about materials and additional work makes the financial transaction less transparent than it should be. Also, the Claimants' cashing of the final payment check also alters the typical award calculation. I shall calculate the award a bit differently than the Fund did. The amount paid by the Claimants to the Respondent was \$47,131.00. As to the reasonable amount the Claimants will be required to pay another contractor to repair poor work done by the Respondent under the original contract, I have included \$7,076.00 paid to Loop Construction, Inc.; \$2,489.00 paid to J.K. Eareckson & Co.

Hardwood Floors; \$800.00 (per Mr. Heyn, without overhead or profit) to vent the basement fan; and \$1,264.21 that the Claimants spent for materials in June and July 2015. (I am assuming that Loop Construction, Inc. repaired the molding that Mr. Heyn cited in his report, so the only unaccounted for deficiency was the vent.) I believe these amounts, totaling \$11,629.00 (rounded down by twenty cents) represent the costs incurred by the Claimants after the Respondent completed his work. The other amounts included by the Fund were part of the original contract or part of the verbal agreement between the Claimants and the Respondent, rather than costs to remediate the Respondent's deficient work. I believe that the Claimants and their subcontractors already were reimbursed from the final payment check cashed by the Claimants. Similarly, I will use the amount of the original contract, without the additional items of work performed by the Respondent. Those items should have been made part of a formal contract or change order.

Based on the formula, the Claimants are entitled to the following award from the Fund:

|  |                                   |
|--|-----------------------------------|
| Amount paid by the Claimant to the Respondent -  | \$47,131.00                       |
| plus   |                                   |
| Reasonable amount the Claimant will be required to pay another contractor to repair poor work done by the Respondent under the original contract - | <u>\$11,629.00</u><br>\$58,750.00 |
| less   |                                   |
| The original contract price -  | <u>\$55,825.00</u><br>\$2,925.00  |

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimants did not unreasonably reject the Respondent's good faith efforts to resolve the Claimant's claim against the Fund. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

I further conclude that the Claimants suffered an actual loss as a result of the Respondent's acts and omissions, specifically his unworkmanlike performance, and that they are entitled to recover an award of \$2,925.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a) and (e) (2015).

**RECOMMENDED ORDER**

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimants be awarded \$2,925.00 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 (2015); and

ORDER that the records and public Commission reflect this decision.

Signature on File

April 20, 2016  
Date Decision Issued

#161821

\_\_\_\_\_  
Robert F. Barry  
Administrative Law Judge



**PROPOSED ORDER**

***WHEREFORE, this 3rd day of June, 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.***

***J. Jean White***

***I. Jean White  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**

MEMORANDUM

TO : SAC, [illegible]

FROM : [illegible]

SUBJECT: [illegible]

[illegible text follows]

[illegible signature]

[illegible name]

DATE: [illegible]

IN THE MATTER OF THE CLAIM \* MARYLAND HOME  
OF CESAR CAMACHO \* IMPROVEMENT COMMISSION  
AGAINST THE MARYLAND HOME \*  
IMPROVEMENT GUARANTY FUND \*  
FOR ALLEGED ACTS OR OMISSIONS \* MHIC CASE NO. 15 (05) 942  
OF SAMUEL GIORDANO \*  
t/a REMODEL WERKS, LLC \*

\* \* \* \* \*

**FINAL ORDER**

WHEREFORE, this 16<sup>th</sup> day of December, 2016, Panel B of the Maryland

Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) Per the stipulation of the Claimant, Finding of Fact No. 13 is amended. The total amount paid by the Claimant to the Respondent is reduced from \$47,131.00 to \$46,706.00, based on funds (\$8,694.00) withheld from Respondent by Claimant. (Claimant Ex. 5, and Fund Ex. 5)

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The Administrative Law Judge applied the correct formula set forth in COMAR 09.08.03.03B(3)(c) for calculation of the Claimant's actual loss.

B) Based on the evidence in the record and the Findings of Fact, the Commission concludes that the calculation of actual loss under the regulation should be modified as follows.

C) The amount paid by the Claimant to the Respondent is reduced to \$46,706.00.

**D) The following additional expenses were incurred by the Claimant to repair and complete work which was the responsibility of the Respondent on the project, and were mistakenly omitted from the calculation of the Claimant's actual loss.**

**1) Purchase of materials during December 2014 - January 2015 in the amount of \$4,765.00. (Finding of Fact No. 21)**

**2) Payment for electrical work in July 2015 in the amount of \$1,520.00. (Finding of Fact No. 49)**

**3) Payment for HVAC work in July 2015 in the amount of \$ 897.00. (Finding of Fact No. 50)**

**E) Pursuant to the formula set forth in COMAR 09.08.03.03B(3)(c), the correct calculation of the Claimant's actual loss is as follows:**

|  |                            |
|--|----------------------------|
| ● Amount paid to Respondent  | <b>\$46,706.00</b>         |
| ● Reasonable cost to repair and complete Respondent's work<br>(\$11,629.00 found by ALJ plus additional \$7,182.20 found in section D above) | <b><u>\$18,811.20</u></b>  |
|  | <b>\$65,517.20</b>         |
| ● Less original contract price   | <b><u>-\$55,825.00</u></b> |
| ● Actual Loss  | <b>\$ 9,962.20</b>         |

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

**A) The Claimant is awarded \$ 9,962.20 from the Home Improvement Guaranty Fund.**

**Final Order**  
**MHIC No. 15 (05) 942**  
**December 16, 2016**  
**Page 3**

- 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.**

***W. Bruce Quackenbush***  
\_\_\_\_\_  
**Chairperson - Panel B**  
**MARYLAND HOME IMPROVEMENT**  
**COMMISSION**