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STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

MARTIN O'MALLEY, Governor
ANTHONY G. BROWN, Lt. Governor
THOMAS E. PEREZ, Secretary

Division of Occupational & Professional Licensing
Maryland Home Improvement Commission
Stanley J. Botts, Commissioner

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The Maryland Home
Improvement Commission

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

v. David B. Barkley
t/a Omega Construction & Remodeling
(Contractor)
and the Claim of
Suresh Jonnagadla
(Claimant)

*
*
*

MHIC No.: 04 (90) 1893

FINAL ORDER

WHEREFORE, this April 7, 2008, Panel B of the Maryland Home Improvement
Commission **ORDERS** that:

1. The Findings of Fact set forth in the Proposed Order dated December 17, 2007 are **AFFIRMED**.
2. The Conclusions of Law set forth in the Proposed Order dated December 17, 2007 are **AFFIRMED**.
3. The Proposed Order dated December 17, 2007 is **AFFIRMED**.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney

Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION



IN THE MATTER OF THE CLAIM OF	*	BEFORE DEBORAH H. BUIE,
SURESH JONNAGADLA	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	*	OAH NO.: DLR-HIC-02-06-34673
DAVID B. BARKLEY T/A	*	MHIC NO.: 04 (90) 1893
OMEGA CONSTRUCTION &	*	
REMODELING,	*	
RESPONDENT		
* * * * *		

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On December 6, 2004, Suresh Jonnagadla (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,459.29 for actual losses suffered as a result of home improvement work performed by David B. Barkley, *u/a* Omega Construction & Remodeling (Respondent).

I conducted a hearing on the claim on behalf of the MHIC, on September 5, 2007, at the Laurel Executive Center, MOSH Training and Education, Laurel, Maryland, under Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004)¹. Hope Miller, Esquire, Assistant Attorney

¹ The first hearing date of February 14, 2007 was cancelled due to inclement weather.

General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimant was present and was represented by Bruce Kurlander, Esquire. The Respondent was present and represented himself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; and COMAR 28.02.01.

ISSUE

The issue is whether the Claimant suffered an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent.

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits that were admitted into evidence except as noted:

- Cl. Ex. 1 Proposal, dated June 2, 2003 and Contract, dated June 16, 2003
- Cl. Ex. 2 Cancelled checks, 8 pages
- Cl. Ex. 3 Final payment acknowledgement, dated May 20, 2004
- Cl. Ex. 4 Contractors Invoice, dated June 3, 2004
- Cl. Ex. 5 Photographs (4)
- Cl. Ex. 6 Photograph
- Cl. Ex. 7 Home Inspection report, dated April 27, 2004
- Cl. Ex. 8 Home Depot Quote, dated November 9, 2004 (8 pages)

- Cl. Ex. 9 Photographs (2)
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- Cl. Ex. 12 Receipts from Turf Center, Inc., dated April 21, 2004 (4 pages)
- Cl. Ex. 13 Estimate from Turf Center Lawns, Inc, dated October 15, 2004
- Cl. Ex. 14 Photographs (2)
- Cl. Ex. 15 Letter to Respondent from Claimant, dated September 19, 2004
- Cl. Ex. 16 Letter to Respondent from Claimant, dated October 30, 2006
- Cl. Ex. 17 Floor plan drawing, dated July 31, 2003
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- Cl. Ex. 19 Howard County Inspection Rejection, dated May 18, 2004
- Cl. Ex. 20 John Heyn's report, dated May 31, 2005, (10 pages)
- Cl. Ex. 21 Not admitted
- Cl. Ex. 22 Letter to MHIC from Respondent, dated June 30, 2005

The Fund submitted the following exhibits that were admitted into evidence:

- Fund Ex. 1. Notice of Hearing, dated February 26, 2007
- Fund Ex. 2. The Respondent's licensing history with the MHIC
- Fund Ex. 3. Hearing Order, July 28, 2006
- Fund Ex. 4. Letter from the MHIC to the Respondent, dated December 10, 2004

The Respondent did not submit any exhibits into evidence.²

² The Respondent contacted the OAH Docket Specialist after the close of the record, by letter, dated September 28, 2007. I did not read the letter; therefore, whatever information contained therein was not taken into consideration in the rendering of this decision. The letter was returned to the Respondent.

Testimony

The Claimant testified and presented the testimony of Thomas Huskins, Sr., a Howard County Government inspector, and John J. Heyn, a MHIC inspector.

The Respondent testified and presented no other witnesses. The Fund presented no witnesses.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was a home improvement contractor licensed by the MHIC.
2. On June 16, 2003, the Claimant and the Respondent entered into a contract to perform work on the Claimant's home as follows: extend the family room by 12 feet; extend the kitchen by 12 feet and construct a sunroom; and extend the dining room for installation of a bay window.
3. The total cost of the original contract was \$54,500.00.
4. The Claimant made the following payments on the original contract, totaling \$53,836.86, to the Respondent:
 - Check no. 3793 for \$4,000.00, dated May 16, 2003
 - Check no. 3806 for \$12,350.00, dated August 9, 2003
 - Check no. 3815 for \$200.00, dated September 25, 2003
 - Check no. 3821 for \$16,350.00, dated September 29, 2003
 - Check no. 3844 for \$14,470.00, dated January 2, 2004
 - Check no. 3873 for \$1,187.10, dated March 24, 2004
 - Check no. 3887 for \$5,279.76, dated May 3, 2004

5. On October 13, 2003, the parties agreed to a change order for additional renovations in the kitchen. The amount of the addendum was \$5,159.00.³ On October 13, 2003, the Claimant paid the Respondent \$2,580.00 for work pursuant to the change order.
6. The Claimant was satisfied with the Respondent's work in the kitchen pursuant to the change order.
7. The final payment made by check no. 3887 represented final monies owed on both the original contract and the addendum.
8. The Respondent performed all of the work proposed by the original contract.
9. The granite floor was improperly installed in both the sunroom and the kitchen. The floor was not level and the lippage (or offset) from one tile to the next tile was greater than 1/16 inch in numerous places. The industry standard recommends lippage no greater than 1/32 inch.
10. The Claimant's culture requires that the family walk barefoot while inside the house. The poor lippage created raised areas that caused scratching upon the bare foot.
11. The transitioning of the existing house floor to the newly constructed floor was not level; the level dropped significantly by more than 3/4 inch.
12. On May 18, 2004, Howard County Government inspector, Thomas Hutchins, rejected the Respondent's work as inadequate. He noted the uneven tiles due to poor lippage and also the improper level in the transition from existing house to the newly constructed floor.
13. Mr. Hutchins determined that the industry standards for transition level, from existing house to new construction, is 1/2 inch.

³ The work performed under the change order is not the subject of this claim.

14. The Respondent acknowledged to the Claimant that some of the kitchen and sunroom tiles were uneven; the Respondent agreed to replace 23 tiles.
15. The construction work performed by the Respondent required excavation of the Claimant's lawn areas. After the construction, the Claimant's lawn required re-seeding and grading. The Respondent performed some rough grading.
16. The contract was silent on the Respondent's responsibility to restore the lawn after construction.
17. The contract includes a disclaimer for the Respondent's responsibility to "alleviate any drainage issues."
18. On October 27, 2004, the Claimant paid Turf Center Lawns, Inc \$3000.00 to re-grade and hydroseed the lawn.
19. On November 9, 2004, the Claimant consulted with another contractor and received a recommendation that all the floor tiles in the kitchen and sunroom be replaced to correct the unevenness of the floor. Home Depot estimated the cost for repair at \$9,234.29.
20. On December 6, 2004, the Claimant submitted a claim against the Respondent with MHIC for the costs associated with the replacement of the granite tile floors.
21. As a part of its investigation, MHIC requested that John Heyn inspect the work done by the Respondent and he did so on April 22, 2005. Mr. Heyn observed the above-stated lippage problems and estimated that the cost to "repair or replace" the granite floor tiles "to comply with industry standards" was \$10,200.00.
22. After Mr. Heyn's inspection and follow-up report, the Respondent returned to the Claimant's house and satisfactorily repaired other problems noted by Mr. Heyn. The

Respondent, however, refused to replace the entire floor tiles because he believed that the Claimant's tile selection contributed to the raised edges (or improper lippage).

23. The Respondent refused to do more than rough grading of the lawn.

DISCUSSION

Section 8-405 of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund, "for an actual loss that results from an act or omission by a licensed contractor..." Md. Code Ann., Bus. Reg. § 8-405 (2004). Section 8-401 defines "actual loss" as "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 (2004).

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

B. Measure of Awards from Guaranty Fund.

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

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

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

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

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(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, 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 measurements accordingly.

This claim against the Fund rests primarily on two allegations by the Claimant. The first concerns the floor in the kitchen and newly constructed sunroom. The Claimant contends that the tiles were improperly installed and he requests compensation to replace the entire floor area. In support of this claim, he presented testimony from a Howard County inspector and the MIHC inspector.

The testimony from Mr. Hutchins, the county inspector, and Mr. Heyn was consistent on the issue of the improperly installed tiles. Mr. Hutchins testified and documented that, in May 2004, he rejected the work performed by the Respondent because the tiles were not level and the lippage was improper. Mr. Heyn testified that, when he inspected the property in April 2005, the tiles were observed to have improper lippage and the floor was generally not level. Mr. Heyn recommended that the entire floor area be re-tiled.

The Claimant also presented an estimate from Home Depot from whom he sought a proposal to fix the improperly installed tiles: their estimate included replacing the entire floor areas of the kitchen and sunroom at a cost of \$9,234.29.

On the issue of the tiles, the Respondent contended that the Claimant chose a tile that was not well-suited for the floor and while he admitted that the lippage was off by a fraction, he maintained that the problem could be fixed by replacing selected tiles. The Respondent presented himself as an expert in granite tile installation and framing; neither the Fund nor Claimant's attorney presented objections and the Respondent was accepted as an expert in that area. He testified that the milled edge on granite is very hard and creates a roughness between tiles. The Respondent suggested that a ceramic tile would have produced better results.⁴ Finally, the Respondent admitted improper lippage in some areas but recommended replacing only 23 tiles; he stated that his company would pay \$400.00 to have a subcontractor perform that work.

The second allegation is that the Respondent failed to restore the Claimant's lawn with re-seeding and also failed to properly grade the lawn area, resulting in poor drainage. The Claimant testified that for months after the Respondent completed the construction he had no grass and his neighbors were starting to complain. He contended that he also observed standing water in the yard that was not a problem before. The Claimant further stated that when he brought the problem to the Respondent's attention, the Respondent did some seeding and some rough grading; however, the Claimant testified that he still observed standing water and the grass seeds did not grow. As a remedy, the Claimant maintained that he hired Turf Center Lawns, Inc to re-grade and seed the affected areas and paid \$3,000.00; however, his claim seeks reimbursement for only \$1,800.00, a lower amount he claims represents the work the Respondent was to perform.

⁴ The Respondent's testimony also referenced a sag in the sunroom floor that could be remedied at a cost of \$300.00; however, neither the Claimant's claim, nor Mr. Heyn's report, references this problem as included in the recommended cost to restore the homeowner.

Mr. Heyn testified that the contract he reviewed between the Claimant and the Respondent was silent on the issue of re-seeding and grading. He maintained that when lawn restoration is a part of a contract, the contract will "90% of the time" either state: "contractor will be responsible for rough grading with landscaping done by homeowner", or "final grading and seeding will be done by contractor."

The Respondent contended that he was only required to control the soil to address issues of erosion which is why his company only performed rough grading. The Respondent maintained that he is not required to make grass grow.

The Fund did not present witnesses but argued that the Claimant was entitled to the costs associated with replacement of the granite tiles, but was not entitled to costs associated with the re-seeding and re-grading.

Weighing the evidence on this issue, I find that the Claimant has presented credible evidence of poor workmanship by the Respondent on the primary issue of the tile installation. I am persuaded by the testimony of Mr. Hutchins and Mr. Heyn that there was improper lippage and areas where the floor was improperly leveled. The Respondent has merely presented self-serving testimony; his contention that only 23 tiles need to be replaced is not supported by any independent assessment. Moreover, he did not satisfactorily rebut the testimony of the Claimant's independent witnesses, by showing bias or other impeachable considerations. While I do not discount the Respondent's experience in the area of tile installation, I give greater weight to the Claimant's presentation, which includes supporting testimony from two individuals who have worked in the area home improvement for over 20 years and a supporting proposal for repair of the work.

On the issue of the lawn work, however, I do not find that the Claimant has sustained a basis for his claim. The credible evidence is that the contract did not require anything more than rough grading by the Respondent. In addition, the Claimant has not shown that the Respondent was responsible for addressing the water pooling because the first paragraph of the original proposal concludes with language establishing a disclaimer for drainage issues.

Having concluded that the claim in this case is valid in part, I turn now to calculating the amount of recovery. As set forth at the beginning of this Discussion, COMAR 09.08.03.03B(3)(c) provides, in part, 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, less the original contract price.

Here, the contractor did work under the contract, and the Claimant is soliciting another contractor to complete the contract *i.e.*, to replace the floor tiles in both the kitchen and the sunroom.

Amount paid to Respondent	\$53,836.86
Reasonable cost of repair/complete work	<u>+ 9,234.29</u>
Subtotal	63,071.15
Respondent's contract price	<u>- 54,500.00</u>
Claimant's actual loss	\$ 8,571.15

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss of \$8,571.15 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

RECOMMENDED ORDER

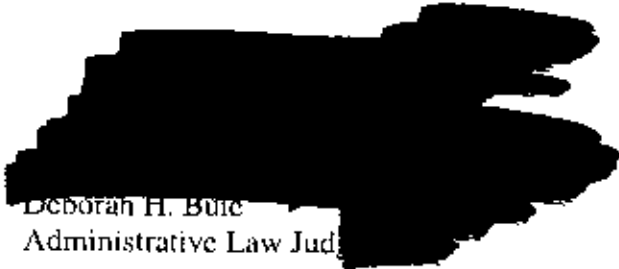
I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Claimant be awarded \$8,571.15 from the Maryland Home Improvement Guaranty Fund; 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 (10%) as set by the Commission, Md. Code Ann., Bus. Reg. § 8-411 (2004); and

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

October 31, 2007
Date Decision Mailed



Deborah H. Buie
Administrative Law Judge

DHB/gar
92431

IN THE MATTER OF THE CLAIM OF	*	BEFORE DEBORAH H. BUIE,
SURESH JONNAGADLA	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	*	OAH NO.: DLR-HIC-02-06-34673
DAVID B. BARKLEY T/A	*	MHIC NO.: 04 (90) 1893
OMEGA CONSTRUCTION &	*	
REMODELING,	*	
RESPONDENT		
* * * * *		

FILE EXHIBIT LIST

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The Respondent did not submit any exhibits into evidence.⁵

⁵ The Respondent contacted the OAH Docket Specialist after the close of the record, by letter, dated September 28, 2007. I did not read the letter; therefore, whatever information contained therein was not taken into consideration in the rendering of this decision. The letter was returned to the Respondent.

PROPOSED ORDER

WHEREFORE, this 17th day of December 2007, 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