

IN THE MATTER OF THE CLAIM OF  
ERNEST M. POWELL, JR.  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF DAVID BARKLEY  
t/a BIRCHFIELD HOMES

\* BEFORE HENRY R. ABRAMS,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DIR-HIC-02-09-38926  
\* MHIC NO.: 08 (05) 1564

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On March 26, 2009, Ernest M. Powell, Jr. (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$32,387.00 for actual losses allegedly suffered as a result of a home improvement contract with David Barkley t/a Birchfield Homes (Respondent).

I held a hearing on April 14, 2010 at the Largo Government Center, 9201 Basil Court, Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Joseph Gibson, Esquire, represented the Claimant, who was present. The Respondent failed to appear after due notice to his address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative

Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

- CL #1 Agreement with Birchfield Remodeling, October 3, 2007
- CL #2 Change Order, January 31, 2008
- CL #3 Copy of cancelled check #2968, in the amount of \$5,000.00, October 3, 2007
- CL #4 Copy of cancelled check #101, in the amount of \$17,500.00, October 17, 2007
- CL #5 Copy of cancelled check #102 in the amount of \$1,897.00, October 24, 2007
- CL #6 Copy of cancelled check #103 in the amount of \$7,990.00, February 25, 2008
- CL #7 Page one of letter from the Prince George's County Permits and Review Division to Michelle Jefferson, April 14, 2008
- CL #8 E-mail from Scott Newsome to the Respondent, April 25, 2008
- CL #9 Handwritten letter (unsigned, but authored by Claimant's wife) to To Whom It May Concern, undated

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

- GF #1 Memo from Sandra Sykes to Legal Services, November 19, 2009, with unclaimed Notice of Hearing, Hearing Order and attachments, and Certified Mail envelope addressed to Respondent, marked Unclaimed
- GF #2 Maryland Department of Assessment and Taxation, Real Property Data Search printout
- GF #3 Licensing History for Respondent
- GF #4 Letter from the HIC to Respondent, April 14, 2009, with attached Home Improvement Claim Form

No exhibits were submitted on the Respondent's behalf.

Testimony

The Claimant testified on his own behalf. No other witnesses testified.

**FINDINGS OF FACT**

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 3592652.<sup>1</sup>
2. The Respondent engaged in the contracting business under a variety of trade names, including, among others, Birchfield Homes, Birchfield Remodeling and Omega Construction & Remodeling (Omega).
3. On October 3, 2007, the Claimant and the Respondent entered into a contract pursuant to which the Respondent, trading as Birchfield Homes, agreed that Omega would perform the following work on the Claimant's home: remove and replace exterior walls of the garage and install new garage doors; raise the existing roof on single level portion of the home and add a second level consisting of a master suite and sunroom; install fixtures in the master bathroom; install flooring in the master bedroom, sunroom, and master bathroom and recessed lighting in the master bedroom; install gas furnace heat and central air conditioning; install new siding on the existing home and addition; and perform all electrical and plumbing work to code. The contract did not indicate when work would begin or be completed.
4. The original agreed upon contract price was \$121,400.00.

<sup>1</sup> The license number is taken from GF Ex. 3. The contract that is the subject of this action lists the Respondent's license number as 51578. No explanation was provided at the hearing for this discrepancy.

5. On January 31, 2008, the Claimant and Respondent, trading as Birchfield Homes, entered into a change order (together with the October 3, 2007 contract, the Agreements). For an additional \$7,900.00, the Respondent was to: add an "eyebrow" covering the front porch and garage area; upgrade to a tiled shower floor; upgrade to two tiled walls, one glass wall and one glass door and bench for the shower; add a Jacuzzi tub with ceramic tile; add a master bedroom closet and four bi-fold doors; add a double-hung vinyl window in the bathroom; and add two vinyl transom windows in the wall between the master bedroom and sunroom.<sup>2</sup>

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

- October 3, 2007	\$ 5,000.00
- October 17, 2007	\$17,500.00
- October 24, 2007	\$ 1,897.00
- February 25, 2008	<u>\$ 7,990.00</u>
Total:	\$32,387.00

7. The Respondent failed to perform any of the work required by the Agreements.

### DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor. . . ." Md. Code Ann., Bus. Reg. § 8-405(a) (2010).

*See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2004). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

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<sup>2</sup> The change order was not signed, but the uncontroverted testimony was that it was effective between the parties, and the Claimant paid the Respondent the full amount due for the work to be done pursuant to the change order.

Second, the Respondent failed to perform any of the work required by the Agreements. There was no evidence that the Agreements were cancelled or that the Respondent's performance had been excused.

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

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.

COMAR 09.08.03.03B(3)(a).

As found above, the Claimant paid the Respondent \$32,387.00 pursuant to the Agreements. The Claimant introduced copies of his checks, totaling this amount, made out to and endorsed by the Respondent. There is no dispute the Respondent received the Claimant's payments.

Pursuant to Md. Code Ann., Bus. Reg. §8-405(e)(1)(2010), the Claimant may recover a maximum of \$20,000.00 from the Fund. Therefore, I find that the Claimant is entitled to reimbursement in the amount of \$20,000.00 from the Fund.<sup>3</sup>

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<sup>3</sup> The governing statute provides that the "Commission may not award . . . more than \$20,000.00 to one claimant for acts or omissions of one contractor[.]" The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. Compare Md. Ann. Code, Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03D(2)(a). I believe the difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thruway Enterprises v. Baltimore Co.*, 2010 WL 1928301 (Md. 2010).

**CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$32,387.00 as a result of the Respondent's acts and omissions, and should be paid \$20,000.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(e)(1) (2010).

**RECOMMENDED ORDER**


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

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

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

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

June 21, 2010  
Date Decision Issued

  
Henry R. Abrams  
Administrative Law Judge

HRA ba  
# 113698

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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 13th day of August 2010, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.*

*Marilyn Jumalon*

*Marilyn Jumalon  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**