

THE MARYLAND HOME

* BEFORE D. HARRISON PRATT,

IMPROVEMENT COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE

AMY SHILINGBURG, TRADING AS

* OF ADMINISTRATIVE HEARINGS

RUSCO HOME IMPROVEMENT

* OAH CASE No.: DLR-HIC-02-13-47182

PRODUCTS, LLC

* OAH CASE No.: DLR-HIC-02-13-47186

RESPONDENT

* OAH CASE No.: DLR-HIC-02-13-47187

* OAH CASE No.: DLR-HIC-02-13-47197

* OAH CASE No.: DLR-HIC-02-13-47202 14(05) 320

* * * * *

RECOMMENDED DECISION¹

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STATEMENT OF THE CASE

In September and October 2013, Linda Rando, Joan Bosley, Carolyn Fitzgerald, James Fuller, and Brenda Morriss (Complainants) complaints against the Respondent with the Maryland Home Improvement Commission (MHIC). Subsequently, the MHIC filed charges against the Respondent alleging violation Md. Code Ann. Bus. Reg. §§ 8-301(a), 8-311(a), 8-601(a), and 8-610(a), and 8-605.

On February 20, 2014, I conducted a hearing at the Office of Administrative Hearings (OAH) 3 Pershing Avenue, Cumberland, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp.

¹ The parties agreed that all of these matters could be heard together.

2013) and § 8-407 (2010). Peter Martin, Assistant Attorney General, represented the MHIC. The Respondent was present at the hearing and represented by Jason Buckel, Esquire. The Complainants were present at the hearing.

The provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUES

The issues are:

1. Whether the Respondent violated any of the Maryland home improvement laws, and if so
2. What if any sanctions should be imposed.

SUMMARY OF THE EVIDENCE

Exhibits

The MHIC offered the following exhibits that, except as indicated, I admitted into evidence for each case:

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|--------|--|
| HIC #1 | Notices of Hearings with Statement of Charges attached |
| HIC #2 | Letter from the HIC to the Respondent, December 26, 2013, with Statement of Charges, Notice of Suspension and mail receipts attached |
| HIC #3 | More Notices of Hearings |
| HIC #4 | Letter from the HIC to the Respondent, January 16, 2014, with mail receipts attached |
| HIC #5 | More Notices of Hearings |

- HIC #6 Letter from the HIC to the Respondent, January 29, 2014, with mail receipts attached
- HIC #7 More Notices of Hearings
- HIC #8 Emails between the Respondent and Steven Smitson, Executive Director of the HIC
- HIC #9 Letter from the Respondent to the HIC, October 28, 2013, with Notice of Suspension, and other attachments
- HIC #10 Memo from the MHIC concerning the Respondent's licensing status, December 4, 2013
- HIC #11 Home improvement contract between Respondent and Joan Bosley, September 11, 2013
- HIC #12 Copy of check for \$502.00 from Joan Bosley to Respondent, September 11, 2013
- HIC #13 Separate home improvement contract between Respondent and Joan Bosley, September 11, 2013 (front page only)
- HIC #14 Copy of check from Joan Bosley for \$1500.00 to Respondent, September 11, 2013
- HIC #15 Letter from Senka's Abbey Carpet to Joan Bosley, October 2, 2013
- HIC #16 HIC Complainant from Joan Bosley, October 15, 2013, with memo attached
- HIC #17 Letter from the Respondent to Joan Bosley, November 12, 2013
- HIC #18 Letters from the Better Business Bureau to Joan Bosley, October 10, 2013 and October 6, 2013
- HIC #19 Front page of the Cumberland Times-News for January 12, 2014

- HIC #20 Front page of the Cumberland Times-News for January 19, 2014
- HIC #21 Home improvement contract between Respondent and Linda Rando, May 24, 2013
- HIC #22 Copy of check for \$537.00 from Linda Rando to the Respondent, May 24, 2013
- HIC #23 Unsigned letter from Linda Rando to the Respondent, August 29, 2013 (unsigned, no address, not admitted but part of the file)
- HIC #24 Unsigned letter from Linda Rando to the Respondent, September 22, 2013, with mail receipt attached (no name or address on the mail receipt, not admitted but part of the file)
- HIC #25 Linda Rando's complaint to the HIC, October 8, 2013, with note attached
- HIC #26 Home improvement contract between Respondent and Carolyn Fitzgerald, April 19, 2013
- HIC #27 Copy of check for \$2800.00 from Carolyn Fitzgerald to the Respondent, April 21, 2013
- HIC #28 Carolyn Fitzgerald's complaint to the HIC, September 26, 2013, with note on the back
- HIC #29 Home improvement contract between Respondent and James Fuller, July 15, 2013
- HIC #30 Copy of check for \$700.00 from James Fuller to the Respondent, July 18, 2013
- HIC #31 James fuller's complainant to the HIC, October 9, 2013, with note attached

- HIC #32 Home improvement contract between Respondent and Brenda Morris, April 29, 2013
- HIC #33 Copy of check for \$1000.00 from Brenda Morris to the Respondent, April 29, 2012
- HIC #34 Brenda Morris' complaint to the HIC, September 25, 2013
- HIC #35 Photograph of the front of the Respondent's current office
- HIC #36 Copy of District Court action against the Respondent, May 30, 2013
- HIC #37 Affidavit from Kevin Niebuhr, HIC Investigator, January 15, 2014, with documents pertaining to civil action against the Respondent by Kohl Building Products.
- HIC #38 Complaint against the Respondent in a matter of a Tennant Holding Over, December 17, 2013
- HIC #39 Internet Case Information Report pertaining to civil tenant holding over action against Respondent.

The Respondent submitted the following documents that I admitted into evidence:

- Resp. Ex. #1 Home Improvement Contract between the Respondent and Complainant Bosley, September 11, 2013
- Resp. Ex. #2 Check from the Respondent to Complainant Bosley, December 17, 2013
- Resp. Ex. #3 Invoice from Senka's Carpet, September 27, 2013
- Resp. Ex. #4 Check from the Respondent to Kohl Building, January 20, 2014

Testimony

All of the Complainants testified on behalf of the MHIC.

Jackie Franklin, previously Jackie Kyle, former employee of the Respondent, also testified on behalf the MHIC. The Respondent testified on her own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. At the time of the contracts and any work pursuant to the contracts, the Respondent was a licensed home improvement contractor under licenses #01-100014 and #05-128202.

2. On October 25, 2013, the MHIC suspended the Respondent's home improvement licenses on an emergency basis, based on the determination by the MHIC that the "public welfare imperatively" required such action because suspension was necessary "in order to protect the citizens of Maryland based upon your pattern of abandonment and failure to complete contracts."

3. After the emergency suspension, the Respondent continued to advertise her business and availability to perform home improvement contracts; however, she did not perform any home improvement work after the suspension.

4. **Contracts with Joan Bosley**

a. Joan Bosley entered into two contracts with the Respondent, both on September 11, 2013. One contract was for the installation of outdoor carpet on the Complainant's concrete porch, and to install raised panel shutters. The contract price was \$502.00, which the Complainant paid in full. A second contract was for the installation of an awning and window railing with a contract price of \$4003.00, of which the Complainant paid \$1,500.00 as a deposit.

b. After several weeks when no work was done and the Complainant's carpet and awning had not been ordered, the Complainant requested a refund of her deposits of \$502.00 and \$1,500.00.

c. The Respondent agreed to a refund but suggested that she was entitled to deduct certain amounts from the deposits as liquidated damages. The contracts have the following liquidated damages clause:

If Buyer terminates this contract before any work has started or before any materials have been ordered, he shall pay seller 12% of the contract price as liquidated damages and not as a penalty, and any other incidental damages occasioned by such termination.

d. The contracts allowed that the work was to begin within four to six weeks. Six weeks from the date of the contracts would have been October 23, 2013 (September 11, 2013 + six weeks = October 23, 2013).

e. Ms. Bosley filed her claim with the MHIC on October 15, 2013.

f. The Respondent performed no work on the two contracts with Joan Bosley.

g. As of October 2, 2013, the Respondent had not ordered the carpet for the Complainant's porch.

5. **Contract with Linda Rando**

a. Linda Rando entered into a contract with the Respondent on May 24, 2013 for the installation of a new awning and removal of an existing awning. The contract price was \$1,611.00. The Complainant paid the Respondent a deposit of \$537.00.

b. Pursuant to the contract, work was to begin within four to six weeks.

c. After several weeks when no work had started, the Complainant called and wrote to the Respondent.

d. On September 23, 2013, the Complainant cancelled the contract. She filed a claim with the MHIC on October 8, 2013.

e. After the Complainant filed her claim, the Respondent sent the Complainant a refund check for the amount of her deposit. The check initially bounced

but subsequently cleared. The Respondent also reimbursed the Complainant for the \$15.00 bank fee for the bounced check.

f. When the bank advised the Complainant that the Respondent's check had bounced, the Complainant called the Cumberland Police Department to file a criminal complaint. As of the date of the hearing, that case had not been resolved.

g. The Respondent did not perform any work under the contract.

6. **Contract with Carolyn Fitzgerald**

a. Carolyn Fitzgerald entered into a contract with the Respondent on April 19, 2013 for the installation of columns, rails, and posts on the front porch. The contract price was \$5,380.00. The Complainant paid the Respondent a deposit of \$2,800.00.

b. On the same day as the contract, the Respondent took measurements where the columns, rails, and posts were to be installed.

c. Columns were installed but they were the wrong size and had to be removed. During a period when no work was being done, the Complainant made several calls to the Respondent. She threatened to take legal action unless the work was done by the end of September. After some additional delays, the work was completed with the Complainant providing the columns.

d. The Complainant was not satisfied with the work because although the columns were acceptable the balusters were only seven inches and they were supposed to be eight inches. This resulted in there being gaps which had to be resolved.

e. The Complainant hired another contractor to complete the work correctly.

f. The Complainant filed her claim with the MHIC on September 26, 2013.

7. **Contract with James Fuller**

a. James Fuller entered into a contract with the Respondent on July 18, 2013 for the installation of a new awning and support rails on the front porch. The contract price was \$1,883.00. The Complainant paid the Respondent \$700.00 as a deposit.

b. On October 1, 2013, after several attempts to contact the Respondent, and after no work had been done, the Complainant filed his complaint.

c. The Respondent reimbursed the Complainant in early December 2013.

8. **Contract with Brenda Morriss**

a. Brenda Morriss entered into a contract with the Respondent on April 29, 2013 to install a new awning and to replace siding as needed. The contract price was \$2,202.00. The Complainant paid the Respondent a deposit of \$1,000.00.

b. The work was to begin within four to six weeks. No work was done in that period.

c. The Complainant spoke with the Respondent who informed her that there was a delay because her new awning could not be shipped until the manufacturer had a full truck.

d. Several weeks passed and still no work was done.

e. The Complainant filed her complaint on September 24, 2013.

f. After the complaint was filed, the Respondent refunded the Complainant's \$1,000.00 deposit.

9. During the time the Complainants were having difficulty getting in touch with the Respondent and getting her to do the work, the Respondent had an employee in her office. This employee, Jackie Franklin, *nee* Kyle, worked for the Respondent from mid June through mid October 2013. She did general office work and spoke to customers, handling their calls and

complaints. She spoke with each of the Complainants at various times when they called to speak to the Respondent and to lodge complaints. When the Respondent was not in the office, Mrs. Franklin would give a written note to the Respondent concerning those who had called. At times she would call a supplier; she also called Rosco Home Improvements, in Roanoke, Virginia to check on orders.²

10. Mrs. Franklin was fired by the Respondent in late September or early October 2013.

11. On March 3, 2013, the Respondent's son, who is currently 22 years old, was seriously injured when he fell off of an escalator and sustained a traumatic brain injury. On April 6, 2013, he was admitted to University of Maryland Shock Trauma. He was in a coma until October 2013. He underwent numerous surgical procedures. The Respondent drove to and from the hospital every day to be with her son. She continued to work during this period but mostly on weekends. During this period, the Respondent was distracted in tending to her son and many telephone messages from customer went unanswered.

DISCUSSION

I find that the Respondent violated the Maryland home improvement laws and as a result she is subject to civil penalties.

The Charges

The Respondent is charged with violating the following statutes:

1. Md. Code Ann., Bus. Reg. §8-311(a)(6) & (11) – often failing to perform home improvement contracts, violates this title
2. Md. Code Ann., Bus. Reg. §8-605(1) – abandoning or failing to perform, without just cause, a home improvement contract

² Although Mrs. Franklin and Complainant Bosley believed that Rosco in Virginia was the same company as the Respondent, this is not the case. Both companies were established in 1947 by the same person. The company was bought out in 2005 when it was divided into two different entities. At times the Respondent orders products from Central Tile & Lumber in Petersburg, Virginia. Central Tile at times orders products from Rosco in Virginia.

3. Md. Code Ann., Bus. Reg. § 8-617(b) – receiving a deposit of more than one third of the contract price
4. Md. Code Ann., Bus. Reg. §8-301(a) – operating as a home improvement contractor without a home improvement license
5. Md. Code Ann., Bus. Reg. §8-601(a) – acting or offering to act as a contractor without a contractor's license
6. Md. Code Ann., Bus. Reg. §8-610(a)(1) – publishing a false, deceptive, or misleading advertisement about home improvement

The Burden of Proof

The MHIC has the burden of proof by a preponderance of the evidence. COMAR 09.01.02.16A.

The Deposits

There was one contract with Mrs. Rando where the deposit accepted by the Respondent was \$537.00 for a contract price of \$1,611.00. This deposit conforms to the one third limit and there was no violation in that regard.

There were two contracts with the Complainant Bosley. The contract price for installing carpet on the porch was \$502.00. The Complainant paid this amount in full upon entering into the contract. Clearly this deposit exceeds one third of the contract price, one third being \$167.33. The contract price for installing the awning was \$4,003.00 and the Complainant paid a deposit of \$1,500.00. This also is in excess of one third of the contract price, one third being \$1,334.33.

There was one contract with the Complainant Carolyn Fitzgerald. The contract price was \$5,380.00 and the Respondent accepted a deposit of \$2,800.00. This is in excess of one third of the contract price, one third being \$1,793.00.

The contract price for the contract with Complainant James Fuller was \$1,883.00. The Respondent accepted a deposit of \$700.00, which was in excess of one third of the contract price, one third being \$627.66. The Respondent said she simply rounded up from \$667.33 to \$700.00.

Finally, the Respondent entered into a contract with Brenda Morriss with a contract price of \$2,002.00. The Complainant paid a deposit of \$1,000.00, which is more than one third of the contract price, one third being \$667.33.

The Respondent violated Md. Code Ann., Bus. Reg. § 8-617(b) by accepting deposits of more than one third of the contract prices in these five contracts. In testimony, she acknowledged being aware of the limits on deposits and that she had knowingly violated the statute. She said that because the exact costs for materials are unknown at the time of signing a contract she would at times increase the deposit amount. She gave no other reason for her actions in this regard.

The Bosley Contracts

Other than proof that the Respondent accepted excess deposits for the two Bosley contracts, the MHIC has failed to show that the Respondent violated any other statutes with regard to these contracts. The evidence is clear that the Respondent did not perform any work on these contracts. However, the Complainant essentially terminated the contracts prior to the time frame within which the Respondent had to begin work. The parties entered into the contracts on September 1, 2013. Both contracts called for work to begin within four to six weeks, i.e. by October 23, 2013 at the latest. Ms. Bosley filed her complaints and claims with the MHIC on October 15, 2013, essentially terminating the contracts.

Ms. Bosley contacted Senka's Abbey Carpet in early October 2013 to inquire whether the Respondent had ordered her carpet. Somehow Ms. Bosley was aware that the Respondent

ordered carpet from Senka's. By letter on October 2, 2013, Senka's advised Ms. Bosley that the Respondent had not ordered any carpet on behalf of the Complainant.

To suggest that the Respondent failed to complete the contracts or abandoned them simply does not comport with the evidence. It may be that the Complainant believed that the Respondent would not complete the work but this is speculation at best. The contracts indicated that the work could be completed in only one day. There was sufficient time for the Respondent to begin and even complete both contracts prior to October 23, 2013. The Respondent made clear her position that Ms. Bosley had terminated the contracts prematurely when she informed the Complainant of the liquidated damages portion of the contracts.

Apparently Ms. Bosley anticipated that the Respondent would not abide by the contracts. In spite of her testimony that she had not discussed the Respondent's actions with other customers or with Jackie Franklin I believe that is exactly what occurred. And frankly, I see nothing sinister in such discussions. In Ms. Bosley's case, although she may not have been advised directly by others to file claims, her discussions with others certainly led to that action. I believe that Ms. Bosley is entitled to a reimbursement of some of her deposits. However, the amount of any refund is not before me as there is no claim for a refund in this matter, but rather only regulatory charges.

The Fuller Contract

Mr. Fuller hired the Respondent to install an awning and rails on his porch. The contract was entered into on July 18, 2013. After four weeks when no work had been done, Mr. Fuller called the Respondent's office and spoke with Jackie Franklin. He was told that the awning had been ordered and would be in in two weeks. He called back in two weeks and Ms. Franklin told him that the awning had not been ordered. Mr. Fuller then made several attempts to contact the Respondent on her cell phone. He left messages but got no response.

Mr. Fuller then received a telephone call from Brenda Morriss. She told Mr. Fuller that she was in the same situation as he was and that he should consider filing a complainant with the MHIC. She explained to Mr. Fuller how to file the complainant and he filed his complaint in early October 2013. After the filing, the Respondent wrote to Mr. Fuller apologizing for what the Respondent indicated her employee had done. In early December 2013, the Respondent refunded Mr. Fuller's deposit in full.

The Respondent acknowledges that no work was performed on this contract but she contends that she was completely unaware that Mr. Fuller ever called to complain or inquire. Her employee, Jackie Franklin never gave her any information concerning the Fuller contract.

The Respondent abandoned the Fuller contract.

The Fitzgerald Contract

The Fitzgerald contract, entered into on April 19, 2013, called for the installation of columns, rails, and posts on the Complainant's front porch. The contract called for work to begin within four weeks. On the same day as the contract, the Respondent took measurements of the Complainant's porch. There was a discussion as to the size of the columns to be installed. The Complainant wanted eight inch columns; the Respondent suggested ten inch columns. The Complainant accepted the suggestion to install ten inch columns. Ten inch columns were installed but at the end of June or beginning of July it was determined that the ten inch columns would not work and they were removed. In early September, when no additional work had been done, the Complainant left a message on the Respondent's cell phone indicating that she would take legal action unless something was done by the end of September. In late September, one of the Respondent's workers returned to the Complainant's house but the columns he brought were the wrong color and size. On September 26, 2013, when no further work was done, Mrs. Fitzgerald file her complainant with the MHIC. In November 2013, Mrs. Fitzgerald called the

Respondent and offered to buy the columns if the Respondent would install them. The columns were installed in December 2013 but only seven balusters were installed when there should have been eight. This caused gaps in the balusters. The Complainant hired another contractor to complete and correct the project.

Although the work was progressing very slowly, Mrs. Fitzgerald stated she didn't push the issue because she was aware of the incident involving the Respondent's son. In late August or early September 2013, Mrs. Fitzgerald received an anonymous call from a female who asked if she was having problems with the Respondent's work. The woman also asked if Mrs. Fitzgerald had filed a complainant with the MHIC. When asked how the woman obtained her name, the caller said she was at the Respondent's office when Mrs. Fitzgerald called in.

The Respondent alleges, with some justification, that the Fitzgerald contract was completed. There were problems however as Mrs. Fitzgerald had contracted for eight balusters and there were only seven installed. This resulted in there being gaps that were covered over with vinyl.

Mrs. Fitzgerald has not filed a claim for reimbursement from the MHIC Fund. She testified that she was given credit for the columns she purchased. The only remaining issue concerning the Fitzgerald contract is whether the work was done in an incomplete or unworkmanlike manner. The Respondent acknowledges that there were gaps after the project was completed. I find that this is sufficient to show that the work was unworkmanlike. However, the Respondent is not charged with unworkmanlike performance on the Fitzgerald contract. She is charged with failing to complete the contract and the evidence before me is that the contract was completed.

The MHIC has failed to show that the Respondent violated any statutes or regulations with regard to the Fitzgerald contract.

The Morriss Contract

Mrs. Morriss hired the Respondent on April 29, 2013 to remove an existing awning and to install a new awning, new siding if needed, replace hinges and a latch. The work was to begin within four weeks. In early June 2013, when no work had started, Mrs. Morriss went to the Respondent's office and spoke with Danielle, the receptionist. She was informed that the delay was caused because the awning could not be shipped until there was a full truck load. Over the next several weeks no work was done and the Respondent failed to return the Complainant's telephone calls and messages. In late August 2013, the Complainant met the Respondent while both were shopping. The Respondent told the Complainant that the awning had just come in last week. Still no work had been done by September and the Complainant left a message for the Respondent threatening to file a complaint. Mrs. Morriss filed her complaint with the MHIC on September 24, 2013. On September 26, 2013, Mrs. Morriss met the Respondent at her office and the Respondent gave her a check for a refund of her \$1,000.00 deposit.

The Respondent alleges that Mrs. Morriss was the instigator of the group of complaints filed against her. I believe this is true. Mrs. Morriss testified that she never contacted any of the other complainants in this matter. In fact, she testified that she didn't even know the other complainants.

On March 2, 2014, Mr. Martin sent me a letter concerning the testimony of Ms. Brenda Morriss, one of the Complainant's in the instant matter. In this letter, Mr. Martin refers to testimony of Ms. Morriss that she had not had any contact with the other Complainants concerning the Respondent. Mr. Martin indicates further that after the hearing he reviewed his notes taken during, or shortly after a telephone conversation with Ms. Morriss on February 20, 2014, which was prior to the hearing in this matter. His notes reflect that Ms. Morriss acknowledged that she had in fact contacted other Complainants. Then on February 27, 2014,

after the hearing, Mr. Martin received a telephone call from Corporal Chris Golliday of the Cumberland Police Department who explained Ms. Morriss told him (Officer Golliday) that her testimony at the hearing had been wrong and that she had in fact contacted Complainants Rando and Fuller concerning this matter prior to the hearing. Clearly Ms. Morriss was not truthful when testifying at the hearing.³

Additionally, I do not believe Mrs. Bosley's testimony that Mrs. Morris never called her about the Respondent. When asked if any such contact was made, she replied "not really." This is hardly a sincere denial.

Frankly, I believe Mrs. Morriss, Jackie Franklin and Mrs. Bosley all spoke about filing complaints against the Respondent. But this makes no difference. The issue is not whether these people planned to file complaints or not but whether the Respondent actually violated any of the statutes. The evidence before me shows clearly that there were violations. The statements of the complainants that were not credible do not detract from the credible evidence that violations occurred. The Respondent failed to do any work on the contract with Mrs. Morriss and therefore violated Md. Code Ann., Bus. Reg. §8-605(1).

The Rando Contract

On May 24, 2013, Mrs. Rondo hired the Respondent to install a new awing and remove an old one. The contract allowed that work was to begin within four to six weeks. No work was done for several weeks and on July 22 Mrs. Rondo called the Respondent's office. The Respondent's employee told the Complainant that a shipment with her awing was due to come on July 29, 2013. Nothing happened within the next few weeks and on August 29, 2013, the Complainant called the Respondent's office again. She followed up with two letters in September 2013. The second letter informed the Respondent that the Complainant was

³ Mr. Martin provided a copy of this letter to Jason Buckel, the Respondent's attorney.

cancelling the contract because nothing had been done. She filed her complaint with the MHIC on October 8, 2013.

After the complaint was filed, Mrs. Rondo received a refund check in the mail. When she deposited the check it was returned for insufficient funds. She deposited the check a second time and it cleared. The Respondent also reimbursed the Complainant for the \$15.00 returned check fee.

The Respondent testified that she never received any complaints from Jackie Franklin concerning the Rando contract. In fact, the Respondent makes this claim as to each of the contracts in this case. The Respondent's testimony in this regard is simply not credible. Clearly she and Mrs. Franklin were at odds. I do not believe however that none of the numerous complaints got through to the Respondent. According to the Respondent, Jackie kept a legal pad noting telephone calls. Once, when Jackie was speaking to Mrs. Bosley on the telephone, the Respondent took the legal pad from her. The Respondent did not bring the legal pad to the hearing. Apparently the pad contained a list of some of the complaints that had been made. The Respondent failed to perform any work under the contract.

Additionally, and in contrast to her statement that she never received any complainants, the Respondent testified that there were numerous telephone calls to her cell phone that would not have gotten through when she was in the hospital visiting her son. At the same time she acknowledges that there were delays in the contracts because of the time she spent visiting her son while he was recuperating.

The Respondent failed to complete the Rando contract.

**Operating as a Home Improvement Contractor Without a Home Improvement License
Acting or Contractor Without a Contractor's License**

Md. Code Ann., Bus. Reg. §8-301(a) provides:

- (a) Except as otherwise provided in this title, a person must have a contractor license whenever the person acts as a contractor in the State.

Md. Code Ann., Bus. Reg. §8-311(c) defines contractor as:

- (c) a person, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.

Because the Respondent was a contractor she was required to have a home improvement license. No one disputes that her home improvement license was suspended on October 25, 2013. After that suspension she continued to advertise that she was a home improvement contractor available to perform home improvement contracts. This was done when two advertisements were published in a local newspaper after the suspension and by a sign in front of her office. She contends that she did not actually perform any home improvement work while suspended and the MHIC has presented no evidence to refute this claim. She has violated Md. Code Ann., Bus. Reg. §8-301(a), and Md. Code Ann., Bus. Reg. §8-601(a).

Publishing a False, Deceptive, or Misleading Advertisement About Home Improvement

Md. Code Ann., Bus. Reg. §8-610(a)(1) provides:

(a) A person may not:

- (1) directly or indirectly publish a false, deceptive, or misleading advertisement about home improvement;

Again, the Respondent continued to advertise that she was available to do home improvement work after she was suspended on October 25, 2013. The advertising certainly was misleading because she could not legally perform such work.

Concerning the advertisements, the Respondent testified credibly that she simply did not think of the advertisements when she was suspended. Additionally, the advertisements were

paid for in the summer of 2013, long before the suspension. Nevertheless, she did violate the statutes, although I find not intentionally.

Penalties

Summary of the violations

The MHIC has proven, by a preponderance of the evidence, the following violations:

1. Often failing to perform home improvement contracts, in this matter failing to perform contracts with Complainants Fuller, Morriss, and Rando in violation of Md. Code Ann., Bus. Reg. §8-311(a)(6) & (11) –
2. Abandoning or failing to perform, without just cause, a home improvement contracts with Complainants Fuller, Morriss, and Rando in violation of Md. Code Ann., Bus. Reg. §8-605(1).
3. Receiving a deposit of more than one third of the contract price in contracts with Complainants Bosley (two contracts), Fitzgerald, Fuller, and Morriss (five contracts) in violation of Md. Code Ann., Bus. Reg. § 8-617(b).
4. Operating as a home improvement contractor without a home improvement license by advertising her availability to perform home improvement contracts after her suspension in violation of Md. Code Ann., Bus. Reg. §8-301(a).
5. Acting or offering to act as a contractor without a contractor’s license by advertising her availability to perform home improvement work after her suspension in violation of Md. Code Ann., Bus. Reg. §8-601(a).
6. Publishing a false, deceptive, or misleading advertisement about home improvements by advertising her availability to perform home improvement contracts after her suspension in violation of Md. Code Ann., Bus. Reg. §8-610(a)(1).

Violations for abandoning or failing to perform

Pursuant to Section 8-311(a) the following penalties are possible for violations of Md.

Code Ann., Bus. Reg. §8-311(a)(6) & (11) and Md. Code Ann., Bus. Reg. §8-605(1):

(a) *In general.* — Subject to the hearing provisions of § 8-312 of this subtitle, the Commission may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee or the management personnel of the applicant or licensee:

- ...
- (11) violates this title;
- (12) attempts to violate this title[.]
- ...

...
(c) *Penalty.* — Instead or in addition to reprimanding a licensee or suspending or revoking a license, the Commission may impose a civil penalty under § 8-620 of this title.

Section 8-620 on the other hand, provides that the Commission may impose a civil penalty for any violation of Title 8 of the Business Regulation Article. Specifically, Section 8-620 states:

(a) In general. The Commission may impose on a person who violates this title, including § 8-607(4) of this subtitle, a civil penalty not exceeding \$5,000 for each violation, whether or not the person is licensed under this title.

(b) Considerations. In setting the amount of a civil penalty, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the complainant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

The violations of §8-311(a)(6) & (11) and §8-605(1) are essentially for the same acts, *i.e.* abandoning or failing to complete home improvement contracts. There were three such contracts not completed, those for Complainants Fuller, Rando, and Morriss. I believe a civil penalty of \$500.00 for each of the three violations (a total of \$1,500.00) is appropriate.

Violations for Accepting Deposits in Excess of One Third

There were five contracts where the Respondent accepted deposits in excess of the permitted amount. Section 8-620 allows a penalty of up to \$5,000.00 per violation of §8-617. I believe a civil penalty of \$500.00 for each of these five violations is appropriate for a total of \$2,500.00.

Violations for Improper Advertising

Three statutes, Md. Code Ann., Bus. Reg. §8-301(a), §8-601(a), and §8-610(a)(1), were violated when the Respondent advertised her availability to perform home improvement contracts after she had been suspended. These statutes are nearly identical and I shall treat their violations as one. An appropriate civil penalty of \$1,000.00 is appropriate, pursuant to §8-620.

I recommend therefore that civil penalties totaling \$5,000 be imposed on the Respondent as follows:

| | |
|--|------------------|
| 1. Failing to complete or abandoning contracts | \$1,500.00 |
| 2. Accepting excess deposits | 2,500.00 |
| 3. Offering to do business after suspension | <u>+1,000.00</u> |
| | \$5,000.00 |

Considerations

I have considered those issues set out in §8-620(b)(1)-(6) and I do not agree with Mr. Martin that revocation of the Respondent's license is appropriate. Neither do I believe that continued suspension of her license is warranted.

Seriousness of the Violation

The violations are certainly serious. However, there are several mitigating circumstances. First, all except one of the Complainant's has been made hold in that they have been refunded whatever deposits they made. Admittedly the refunds were not made until after complaints were made. As to the refund for Mrs. Bosley, that has been offered but rejected because of the Respondent's claim that she is entitled to liquidated damages. I believe the Respondent has a legitimate position but, as mentioned, that issue is not before me. I trust that the parties can resolve that issue themselves, especially with input from counsel. The seriousness is also mitigated by the Respondent's need to attend to her seriously injured son, discussed more fully later.

So, although there are mitigating circumstances, the Respondent is rightfully called to task with regard to these violations. Much, if not all, of the issues in this case could have been avoided had the Respondent simply spoken to the Complainants. Some of the Complainants have expressed concern for the Respondent because of the situation with her son and I feel certain that she could have tapped into this concern by contacting those involved. I do not believe for a moment that the Respondent was unaware of the numerous telephone calls or complaints.

Good Faith of the Respondent

This issue presents both positive and negative elements. As mentioned, all of the Complainants have been reimbursed except for Mrs. Bosley, and she has been offered some reimbursement. None of the Complainants were precluded from filing claims against the MHIC Guaranty Fund. On the negative side, the Respondent could have avoided all of these issues by contacting the Complainants in a timely manner and by refunding deposits prior to complaints being filed. Additionally, I do not believe the Respondent was completely forthright in suggesting that she was unaware of complaints. This is demonstrated in part, in my view, by the fact that she failed to bring the legal pads to the hearing. The legal pads apparently listed a number of complaints. Regardless of what was on the legal pads, she made a point of stating that she "grabbed" them from Jackie Franklin while Mrs. Franklin was on the telephone with Mrs. Bosley. I am therefore suspicious of what was actually listed on the pads.

Previous Violations

The MHIC presented no evidence concerning the Respondent history of violations and it made no claim of anything untoward in her history. I assume therefore that the charges in this matter are the first ever filed against the Respondent. That is certainly to her benefits in determining what sanctions should be imposed.

Harmful Effect of the Violations

I find that none of the Complainants were financially harmed. Certainly it was stressful for the Complainants not to have their work done in a timely manner or at all. They have not lost any money. Neither was the public at large harmed to any great degree, even by the misrepresentations in the Respondent's advertising. On the other hand, it does not place the home improvement industry as a whole in a very good light.

Assets of the Respondent

The MHIC presented evidence tending to show that the Respondent was having some financial difficulties during the period in question. No other evidence of the Respondent's financial status was introduced into evidence. I assume that she has continued to have financial difficulties in that she has been unable to perform any home improvement since October 2013.

Other Relevant Factors (The Distraction of the Respondent Due to the Injury to Her Son)

I have explained in the findings of fact what occurred with the Respondent's son in March 2013. Mr. Martin acknowledges that this was certainly a concern for the Respondent and few if anyone would disagree. Traveling to and from Chicago initially and later to and from Shock Trauma and rehabilitation facilities in Maryland as her son was being treated and recuperating clearly was time consuming. More significantly, the stress involved, I believe, was a major reason for the Respondent's inattention to her home improvement business. This does not excuse her actions or lack thereof, but it does mitigate them.

Her suspension since October 2013 has certainly caused a loss of income for the Respondent. This, coupled with the civil penalties I am recommending will suffice to impress upon the Respondent the gravity of her errors. Revocation or an additional suspension of her license would be overly severe and only add to her existing difficulties. I recommend that the current suspension be ended.

I recommend that the Commission assess a total civil penalty of \$5,000.00 on the Respondent and that it end the current suspension.

CONCLUSIONS OF LAW

I conclude the following:


- A. The Respondent violated Md. Code Ann., Bus. Reg. §§8-311(a)(6)-(11), 8-605(1), 8-617(b), 8-301(a), 8-601(a), and 8-610(a)(1).
- B. The Respondent is subject to sanction under Md. Code Ann., Bus. Reg. § 8-620 (Supp. 2011).

RECOMMENDED ORDER

I RECOMMEND the following:

- A. The Maryland Home Improvement Commission find that the Respondent violated Md. Code Ann., Bus. Reg. §§8-311(a)(6)-(11), 8-605(1), 8-617(b), 8-301(a), 8-601(a), and 8-610(a)(1). (Supp. 2011).
- B. The Maryland Home Improvement Commission order the Respondent to pay a total civil penalty of \$5,000.00, pursuant to Md. Code Ann., Bus. Reg. § 8-620 (Supp. 2011).
- C. The records and publications of the Maryland Home Improvement Commission reflect this decision.

May 19, 2014
Date Decision Mailed


D. Harrison Pratt
Administrative Law Judge

DHP/brp
#147861

THE MARYLAND HOME
IMPROVEMENT COMMISSION

v.

AMY SHILINGBURG, TRADING AS
RUSCO HOME IMPROVEMENT
PRODUCTS, LLC

RESPONDENT

* BEFORE D. HARRISON PRATT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No.: DLR-HIC-02-13-47182
* OAH CASE No.: DLR-HIC-02-13-47186
* OAH CASE No.: DLR-HIC-02-13-47187
* OAH CASE No.: DLR-HIC-02-13-47197 14(05) 374
* OAH CASE No.: DLR-HIC-02-13-47202

* * * * *

RECOMMENDED DECISION¹

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

STATEMENT OF THE CASE

In September and October 2013, Linda Rando, Joan Bosley, Carolyn Fitzgerald, James Fuller, and Brenda Morriss (Complainants) complaints against the Respondent with the Maryland Home Improvement Commission (MHIC). Subsequently, the MHIC filed charges against the Respondent alleging violation Md. Code Ann. Bus. Reg. §§ 8-301(a), 8-311(a), 8-601(a), and 8-610(a), and 8-605.

On February 20, 2014, I conducted a hearing at the Office of Administrative Hearings (OAH) 3 Pershing Avenue, Cumberland, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp.

¹ The parties agreed that all of these matters could be heard together.

2013) and § 8-407 (2010). Peter Martin, Assistant Attorney General, represented the MHIC. The Respondent was present at the hearing and represented by Jason Buckel, Esquire. The Complainants were present at the hearing.

The provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUES

The issues are:

1. Whether the Respondent violated any of the Maryland home improvement laws, and if so
2. What if any sanctions should be imposed.

SUMMARY OF THE EVIDENCE

Exhibits

The MHIC offered the following exhibits that, except as indicated, I admitted into evidence for each case:

- | | |
|--------|--|
| HIC #1 | Notices of Hearings with Statement of Charges attached |
| HIC #2 | Letter from the HIC to the Respondent, December 26, 2013, with Statement of Charges, Notice of Suspension and mail receipts attached |
| HIC #3 | More Notices of Hearings |
| HIC #4 | Letter from the HIC to the Respondent, January 16, 2014, with mail receipts attached |
| HIC #5 | More Notices of Hearings |

- HIC #6 Letter from the HIC to the Respondent, January 29, 2014, with mail receipts attached
- HIC #7 More Notices of Hearings
- HIC #8 Emails between the Respondent and Steven Smitson, Executive Director of the HIC
- HIC #9 Letter from the Respondent to the HIC, October 28, 2013, with Notice of Suspension, and other attachments
- HIC #10 Memo from the MHIC concerning the Respondent's licensing status, December 4, 2013
- HIC #11 Home improvement' contract between Respondent and Joan Bosley, September 11, 2013
- HIC #12 Copy of check for \$502.00 from Joan Bosley to Respondent, September 11, 2013
- HIC #13 Separate home improvement contract between Respondent and Joan Bosley, September 11, 2013 (front page only)
- HIC #14 Copy of check from Joan Bosley for \$1500.00 to Respondent, September 11, 2013
- HIC #15 Letter from Senka's Abbey Carpet to Joan Bosley, October 2, 2013
- HIC #16 HIC Complainant from Joan Bosley, October 15, 2013, with memo attached
- HIC #17 Letter from the Respondent to Joan Bosley, November 12, 2013
- HIC #18 Letters from the Better Business Bureau to Joan Bosley, October 10, 2013 and October 6, 2013
- HIC #19 Front page of the Cumberland Times-News for January 12, 2014

- HIC #20 Front page of the Cumberland Times-News for January 19, 2014
- HIC #21 Home improvement contract between Respondent and Linda Rando, May 24, 2013
- HIC #22 Copy of check for \$537.00 from Linda Rando to the Respondent, May 24, 2013
- HIC #23 Unsigned letter from Linda Rando to the Respondent, August 29, 2013 (unsigned, no address, not admitted but part of the file)
- HIC #24 Unsigned letter from Linda Rando to the Respondent, September 22, 2013, with mail receipt attached (no name or address on the mail receipt, not admitted but part of the file)
- HIC #25 Linda Rando's complaint to the HIC, October 8, 2013, with note attached
- HIC #26 Home improvement contract between Respondent and Carolyn Fitzgerald, April 19, 2013
- HIC #27 Copy of check for \$2800.00 from Carolyn Fitzgerald to the Respondent, April 21, 2013
- HIC #28 Carolyn Fitzgerald's complaint to the HIC, September 26, 2013, with note on the back
- HIC #29 Home improvement contract between Respondent and James Fuller, July 15, 2013
- HIC #30 Copy of check for \$700.00 from James Fuller to the Respondent, July 18, 2013
- HIC #31 James fuller's complainant to the HIC, October 9, 2013, with note attached

- HIC #32 Home improvement contract between Respondent and Brenda Morris, April 29, 2013
- HIC #33 Copy of check for \$1000.00 from Brenda Morris to the Respondent, April 29, 2012
- HIC #34 Brenda Morris' complaint to the HIC, September 25, 2013
- HIC #35 Photograph of the front of the Respondent's current office
- HIC #36 Copy of District Court action against the Respondent, May 30, 2013
- HIC #37 Affidavit from Kevin Niebuhr, HIC Investigator, January 15, 2014, with documents pertaining to civil action against the Respondent by Kohl Building Products.
- HIC #38 Complaint against the Respondent in a matter of a Tennant Holding Over, December 17, 2013
- HIC #39 Internet Case Information Report pertaining to civil tenant holding over action against Respondent.

The Respondent submitted the following documents that I admitted into evidence:

- Resp. Ex. #1 Home Improvement Contract between the Respondent and Complainant Bosley, September 11, 2013
- Resp. Ex. #2 Check from the Respondent to Complainant Bosley, December 17, 2013
- Resp. Ex. #3 Invoice from Senka's Carpet, September 27, 2013
- Resp. Ex. #4 Check from the Respondent to Kohl Building, January 20, 2014

Testimony

All of the Complainants testified on behalf of the MHIC.

Jackie Franklin, previously Jackie Kyle, former employee of the Respondent, also testified on behalf the MHIC. The Respondent testified on her own behalf.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. At the time of the contracts and any work pursuant to the contracts, the Respondent was a licensed home improvement contractor under licenses #01-100014 and #05-128202.

2. On October 25, 2013, the MHIC suspended the Respondent's home improvement licenses on an emergency basis, based on the determination by the MHIC that the "public welfare imperatively" required such action because suspension was necessary "in order to protect the citizens of Maryland based upon your pattern of abandonment and failure to complete contracts."

3. After the emergency suspension, the Respondent continued to advertise her business and availability to perform home improvement contracts; however, she did not perform any home improvement work after the suspension.

4. Contracts with Joan Bosley

a. Joan Bosley entered into two contracts with the Respondent, both on September 11, 2013. One contract was for the installation of outdoor carpet on the Complainant's concrete porch, and to install raised panel shutters. The contract price was \$502.00, which the Complainant paid in full. A second contract was for the installation of an awning and window railing with a contract price of \$4003.00, of which the Complainant paid \$1,500.00 as a deposit.

b. After several weeks when no work was done and the Complainant's carpet and awning had not been ordered, the Complainant requested a refund of her deposits of \$502.00 and \$1,500.00.

c. The Respondent agreed to a refund but suggested that she was entitled to deduct certain amounts from the deposits as liquidated damages. The contracts have the following liquidated damages clause:

If Buyer terminates this contract before any work has started or before any materials have been ordered, he shall pay seller 12% of the contract price as liquidated damages and not as a penalty, and any other incidental damages occasioned by such termination.

d. The contracts allowed that the work was to begin within four to six weeks. Six weeks from the date of the contracts would have been October 23, 2013 (September 11, 2013 + six weeks = October 23, 2013).

e. Ms. Bosley filed her claim with the MHIC on October 15, 2013.

f. The Respondent performed no work on the two contracts with Joan Bosley.

g. As of October 2, 2013, the Respondent had not ordered the carpet for the Complainant's porch.

5. **Contract with Linda Rando**

a. Linda Rando entered into a contract with the Respondent on May 24, 2013 for the installation of a new awning and removal of an existing awning. The contract price was \$1,611.00. The Complainant paid the Respondent a deposit of \$537.00.

b. Pursuant to the contract, work was to begin within four to six weeks.

c. After several weeks when no work had started, the Complainant called and wrote to the Respondent.

d. On September 23, 2013, the Complainant cancelled the contract. She filed a claim with the MHIC on October 8, 2013.

e. After the Complainant filed her claim, the Respondent sent the Complainant a refund check for the amount of her deposit. The check initially bounced

but subsequently cleared. The Respondent also reimbursed the Complainant for the \$15.00 bank fee for the bounced check.

f. When the bank advised the Complainant that the Respondent's check had bounced, the Complainant called the Cumberland Police Department to file a criminal complaint. As of the date of the hearing, that case had not been resolved.

g. The Respondent did not perform any work under the contract.

6. **Contract with Carolyn Fitzgerald**

a. Carolyn Fitzgerald entered into a contract with the Respondent on April 19, 2013 for the installation of columns, rails, and posts on the front porch. The contract price was \$5,380.00. The Complainant paid the Respondent a deposit of \$2,800.00.

b. On the same day as the contract, the Respondent took measurements where the columns, rails, and posts were to be installed.

c. Columns were installed but they were the wrong size and had to be removed. During a period when no work was being done, the Complainant made several calls to the Respondent. She threatened to take legal action unless the work was done by the end of September. After some additional delays, the work was completed with the Complainant providing the columns.

d. The Complainant was not satisfied with the work because although the columns were acceptable the balusters were only seven inches and they were supposed to be eight inches. This resulted in there being gaps which had to be resolved.

e. The Complainant hired another contractor to complete the work correctly.

f. The Complainant filed her claim with the MHIC on September 26, 2013.

7. **Contract with James Fuller**

a. James Fuller entered into a contract with the Respondent on July 18, 2013 for the installation of a new awning and support rails on the front porch. The contract price was \$1,883.00. The Complainant paid the Respondent \$700.00 as a deposit.

b. On October 1, 2013, after several attempts to contact the Respondent, and after no work had been done, the Complainant filed his complaint.

c. The Respondent reimbursed the Complainant in early December 2013.

8. **Contract with Brenda Morriss**

a. Brenda Morriss entered into a contract with the Respondent on April 29, 2013 to install a new awning and to replace siding as needed. The contract price was \$2,202.00. The Complainant paid the Respondent a deposit of \$1,000.00.

b. The work was to begin within four to six weeks. No work was done in that period.

c. The Complainant spoke with the Respondent who informed her that there was a delay because her new awning could not be shipped until the manufacturer had a full truck.

d. Several weeks passed and still no work was done.

e. The Complainant filed her complaint on September 24, 2013.

f. After the complaint was filed, the Respondent refunded the Complainant's \$1,000.00 deposit.

9. During the time the Complainants were having difficulty getting in touch with the Respondent and getting her to do the work, the Respondent had an employee in her office. This employee, Jackie Franklin, *nee* Kyle, worked for the Respondent from mid June through mid October 2013. She did general office work and spoke to customers, handling their calls and

complaints. She spoke with each of the Complainants at various times when they called to speak to the Respondent and to lodge complaints. When the Respondent was not in the office, Mrs. Franklin would give a written note to the Respondent concerning those who had called. At times she would call a supplier; she also called Rosco Home Improvements, in Roanoke, Virginia to check on orders.²

10. Mrs. Franklin was fired by the Respondent in late September or early October 2013.

11. On March 3, 2013, the Respondent's son, who is currently 22 years old, was seriously injured when he fell off of an escalator and sustained a traumatic brain injury. On April 6, 2013, he was admitted to University of Maryland Shock Trauma. He was in a coma until October 2013. He underwent numerous surgical procedures. The Respondent drove to and from the hospital every day to be with her son. She continued to work during this period but mostly on weekends. During this period, the Respondent was distracted in tending to her son and many telephone messages from customer went unanswered.

DISCUSSION

I find that the Respondent violated the Maryland home improvement laws and as a result she is subject to civil penalties.

The Charges

The Respondent is charged with violating the following statutes:

1. Md. Code Ann., Bus. Reg. §8-311(a)(6) & (11) – often failing to perform home improvement contracts, violates this title
2. Md. Code Ann., Bus. Reg. §8-605(1) – abandoning or failing to perform, without just cause, a home improvement contract

² Although Mrs. Franklin and Complainant Bosley believed that Rosco in Virginia was the same company as the Respondent, this is not the case. Both companies were established in 1947 by the same person. The company was bought out in 2005 when it was divided into two different entities. At times the Respondent orders products from Central Tile & Lumber in Petersburg, Virginia. Central Tile at times orders products from Rosco in Virginia.

3. Md. Code Ann., Bus. Reg. § 8-617(b) – receiving a deposit of more than one third of the contract price
4. Md. Code Ann., Bus. Reg. §8-301(a) – operating as a home improvement contractor without a home improvement license
5. Md. Code Ann., Bus. Reg. §8-601(a) – acting or offering to act as a contractor without a contractor's license
6. Md. Code Ann., Bus. Reg. §8-610(a)(1) – publishing a false, deceptive, or misleading advertisement about home improvement

The Burden of Proof

The MHIC has the burden of proof by a preponderance of the evidence. COMAR 09.01.02.16A.

The Deposits

There was one contract with Mrs. Rando where the deposit accepted by the Respondent was \$537.00 for a contract price of \$1,611.00. This deposit conforms to the one third limit and there was no violation in that regard.

There were two contracts with the Complainant Bosley. The contract price for installing carpet on the porch was \$502.00. The Complainant paid this amount in full upon entering into the contract. Clearly this deposit exceeds one third of the contract price, one third being \$167.33. The contract price for installing the awning was \$4,003.00 and the Complainant paid a deposit of \$1,500.00. This also is in excess of one third of the contract price, one third being \$1,334.33.

There was one contract with the Complainant Carolyn Fitzgerald. The contract price was \$5,380.00 and the Respondent accepted a deposit of \$2,800.00. This is in excess of one third of the contract price, one third being \$1,793.00.

The contract price for the contract with Complainant James Fuller was \$1,883.00. The Respondent accepted a deposit of \$700.00, which was in excess of one third of the contract price, one third being \$627.66. The Respondent said she simply rounded up from \$667.33 to \$700.00.

Finally, the Respondent entered into a contract with Brenda Morriss with a contract price of \$2,002.00. The Complainant paid a deposit of \$1,000.00, which is more than one third of the contract price, one third being \$667.33.

The Respondent violated Md. Code Ann., Bus. Reg. § 8-617(b) by accepting deposits of more than one third of the contract prices in these five contracts. In testimony, she acknowledged being aware of the limits on deposits and that she had knowingly violated the statute. She said that because the exact costs for materials are unknown at the time of signing a contract she would at times increase the deposit amount. She gave no other reason for her actions in this regard.

The Bosley Contracts

Other than proof that the Respondent accepted excess deposits for the two Bosley contracts, the MHIC has failed to show that the Respondent violated any other statutes with regard to these contracts. The evidence is clear that the Respondent did not perform any work on these contracts. However, the Complainant essentially terminated the contracts prior to the time frame within which the Respondent had to begin work. The parties entered into the contracts on September 1, 2013. Both contracts called for work to begin within four to six weeks, i.e. by October 23, 2013 at the latest. Ms. Bosley filed her complaints and claims with the MHIC on October 15, 2013, essentially terminating the contracts.

Ms. Bosley contacted Senka's Abbey Carpet in early October 2013 to inquire whether the Respondent had ordered her carpet. Somehow Ms. Bosley was aware that the Respondent

ordered carpet from Senka's. By letter on October 2, 2013, Senka's advised Ms. Bosley that the Respondent had not ordered any carpet on behalf of the Complainant.

To suggest that the Respondent failed to complete the contracts or abandoned them simply does not comport with the evidence. It may be that the Complainant believed that the Respondent would not complete the work but this is speculation at best. The contracts indicated that the work could be completed in only one day. There was sufficient time for the Respondent to begin and even complete both contracts prior to October 23, 2013. The Respondent made clear her position that Ms. Bosley had terminated the contracts prematurely when she informed the Complainant of the liquidated damages portion of the contracts.

Apparently Ms. Bosley anticipated that the Respondent would not abide by the contracts. In spite of her testimony that she had not discussed the Respondent's actions with other customers or with Jackie Franklin I believe that is exactly what occurred. And frankly, I see nothing sinister in such discussions. In Ms. Bosley's case, although she may not have been advised directly by others to file claims, her discussions with others certainly led to that action. I believe that Ms. Bosley is entitled to a reimbursement of some of her deposits. However, the amount of any refund is not before me as there is no claim for a refund in this matter, but rather only regulatory charges.

The Fuller Contract

Mr. Fuller hired the Respondent to install an awning and rails on his porch. The contract was entered into on July 18, 2013. After four weeks when no work had been done, Mr. Fuller called the Respondent's office and spoke with Jackie Franklin. He was told that the awning had been ordered and would be in in two weeks. He called back in two weeks and Ms. Franklin told him that the awning had not been ordered. Mr. Fuller then made several attempts to contact the Respondent on her cell phone. He left messages but got no response.

Mr. Fuller then received a telephone call from Brenda Morriss. She told Mr. Fuller that she was in the same situation as he was and that he should consider filing a complainant with the MHIC. She explained to Mr. Fuller how to file the complainant and he filed his complaint in early October 2013. After the filing, the Respondent wrote to Mr. Fuller apologizing for what the Respondent indicated her employee had done. In early December 2013, the Respondent refunded Mr. Fuller's deposit in full.

The Respondent acknowledges that no work was performed on this contract but she contends that she was completely unaware that Mr. Fuller ever called to complain or inquire. Her employee, Jackie Franklin never gave her any information concerning the Fuller contract.

The Respondent abandoned the Fuller contract.

The Fitzgerald Contract

The Fitzgerald contract, entered into on April 19, 2013, called for the installation of columns, rails, and posts on the Complainant's front porch. The contract called for work to begin within four weeks. On the same day as the contract, the Respondent took measurements of the Complainant's porch. There was a discussion as to the size of the columns to be installed. The Complainant wanted eight inch columns; the Respondent suggested ten inch columns. The Complainant accepted the suggestion to install ten inch columns. Ten inch columns were installed but at the end of June or beginning of July it was determined that the ten inch columns would not work and they were removed. In early September, when no additional work had been done, the Complainant left a message on the Respondent's cell phone indicating that she would take legal action unless something was done by the end of September. In late September, one of the Respondent's workers returned to the Complainant's house but the columns he brought were the wrong color and size. On September 26, 2013, when no further work was done, Mrs. Fitzgerald file her complainant with the MHIC. In November 2013, Mrs. Fitzgerald called the

Respondent and offered to buy the columns if the Respondent would install them. The columns were installed in December 2013 but only seven balusters were installed when there should have been eight. This caused gaps in the balusters. The Complainant hired another contractor to complete and correct the project.

Although the work was progressing very slowly, Mrs. Fitzgerald stated she didn't push the issue because she was aware of the incident involving the Respondent's son. In late August or early September 2013, Mrs. Fitzgerald received an anonymous call from a female who asked if she was having problems with the Respondent's work. The woman also asked if Mrs. Fitzgerald had filed a complainant with the MHIC. When asked how the woman obtained her name, the caller said she was at the Respondent's office when Mrs. Fitzgerald called in.

The Respondent alleges, with some justification, that the Fitzgerald contract was completed. There were problems however as Mrs. Fitzgerald had contracted for eight balusters and there were only seven installed. This resulted in there being gaps that were covered over with vinyl.

Mrs. Fitzgerald has not filed a claim for reimbursement from the MHIC Fund. She testified that she was given credit for the columns she purchased. The only remaining issue concerning the Fitzgerald contract is whether the work was done in an incomplete or unworkmanlike manner. The Respondent acknowledges that there were gaps after the project was completed. I find that this is sufficient to show that the work was unworkmanlike. However, the Respondent is not charged with unworkmanlike performance on the Fitzgerald contract. She is charged with failing to complete the contract and the evidence before me is that the contract was completed.

The MHIC has failed to show that the Respondent violated any statutes or regulations with regard to the Fitzgerald contract.

The Morriss Contract

Mrs. Morriss hired the Respondent on April 29, 2013 to remove an existing awning and to install a new awning, new siding if needed, replace hinges and a latch. The work was to begin within four weeks. In early June 2013, when no work had started, Mrs. Morriss went to the Respondent's office and spoke with Danielle, the receptionist. She was informed that the delay was caused because the awning could not be shipped until there was a full truck load. Over the next several weeks no work was done and the Respondent failed to return the Complainant's telephone calls and messages. In late August 2013, the Complainant met the Respondent while both were shopping. The Respondent told the Complainant that the awning had just come in last week. Still no work had been done by September and the Complainant left a message for the Respondent threatening to file a complaint. Mrs. Morriss filed her complaint with the MHIC on September 24, 2013. On September 26, 2013, Mrs. Morriss met the Respondent at her office and the Respondent gave her a check for a refund of her \$1,000.00 deposit.

The Respondent alleges that Mrs. Morriss was the instigator of the group of complaints filed against her. I believe this is true. Mrs. Morriss testified that she never contacted any of the other complainants in this matter. In fact, she testified that she didn't even know the other complainants.

On March 2, 2014, Mr. Martin sent me a letter concerning the testimony of Ms. Brenda Morriss, one of the Complainant's in the instant matter. In this letter, Mr. Martin refers to testimony of Ms. Morriss that she had not had any contact with the other Complainants concerning the Respondent. Mr. Martin indicates further that after the hearing he reviewed his notes taken during, or shortly after a telephone conversation with Ms. Morriss on February 20, 2014, which was prior to the hearing in this matter. His notes reflect that Ms. Morriss acknowledged that she had in fact contacted other Complainants. Then on February 27, 2014,

after the hearing, Mr. Martin received a telephone call from Corporal Chris Golliday of the Cumberland Police Department who explained Ms. Morriss told him (Officer Golliday) that her testimony at the hearing had been wrong and that she had in fact contacted Complainants Rando and Fuller concerning this matter prior to the hearing. Clearly Ms. Morriss was not truthful when testifying at the hearing.³

Additionally, I do not believe Mrs. Bosley's testimony that Mrs. Morris never called her about the Respondent. When asked if any such contact was made, she replied "not really." This is hardly a sincere denial.

Frankly, I believe Mrs. Morriss, Jackie Franklin and Mrs. Bosley all spoke about filing complaints against the Respondent. But this makes no difference. The issue is not whether these people planned to file complaints or not but whether the Respondent actually violated any of the statutes. The evidence before me shows clearly that there were violations. The statements of the complainants that were not credible do not detract from the credible evidence that violations occurred. The Respondent failed to do any work on the contract with Mrs. Morriss and therefore violated Md. Code Ann., Bus. Reg. §8-605(1).

The Rando Contract

On May 24, 2013, Mrs. Rondo hired the Respondent to install a new awing and remove an old one. The contract allowed that work was to begin within four to six weeks. No work was done for several weeks and on July 22 Mrs. Rondo called the Respondent's office. The Respondent's employee told the Complainant that a shipment with her awing was due to come on July 29, 2013. Nothing happened within the next few weeks and on August 29, 2013, the Complainant called the Respondent's office again. She followed up with two letters in September 2013. The second letter informed the Respondent that the Complainant was

³ Mr. Martin provided a copy of this letter to Jason Buckel, the Respondent's attorney.

cancelling the contract because nothing had been done. She filed her complaint with the MHIC on October 8, 2013.

After the complaint was filed, Mrs. Rondo received a refund check in the mail. When she deposited the check it was returned for insufficient funds. She deposited the check a second time and it cleared. The Respondent also reimbursed the Complainant for the \$15.00 returned check fee.

The Respondent testified that she never received any complaints from Jackie Franklin concerning the Rando contract. In fact, the Respondent makes this claim as to each of the contracts in this case. The Respondent's testimony in this regard is simply not credible. Clearly she and Mrs. Franklin were at odds. I do not believe however that none of the numerous complaints got through to the Respondent. According to the Respondent, Jackie kept a legal pad noting telephone calls. Once, when Jackie was speaking to Mrs. Bosley on the telephone, the Respondent took the legal pad from her. The Respondent did not bring the legal pad to the hearing. Apparently the pad contained a list of some of the complaints that had been made. The Respondent failed to perform any work under the contract.

Additionally, and in contrast to her statement that she never received any complainants, the Respondent testified that there were numerous telephone calls to her cell phone that would not have gotten through when she was in the hospital visiting her son. At the same time she acknowledges that there were delays in the contracts because of the time she spent visiting her son while he was recuperating.

The Respondent failed to complete the Rando contract.

**Operating as a Home Improvement Contractor Without a Home Improvement License
Acting or Contractor Without a Contractor's License**

Md. Code Ann., Bus. Reg. §8-301(a) provides:

- (a) Except as otherwise provided in this title, a person must have a contractor license whenever the person acts as a contractor in the State.

Md. Code Ann., Bus. Reg. §8-311(c) defines contractor as:

- (c) a person, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.

Because the Respondent was a contractor she was required to have a home improvement license. No one disputes that her home improvement license was suspended on October 25, 2013. After that suspension she continued to advertise that she was a home improvement contractor available to perform home improvement contracts. This was done when two advertisements were published in a local newspaper after the suspension and by a sign in front of her office. She contends that she did not actually perform any home improvement work while suspended and the MHIC has presented no evidence to refute this claim. She has violated Md. Code Ann., Bus. Reg. §8-301(a), and Md. Code Ann., Bus. Reg. §8-601(a).

Publishing a False, Deceptive, or Misleading Advertisement About Home Improvement

Md. Code Ann., Bus. Reg. §8-610(a)(1) provides:

- (a) A person may not:
 - (1) directly or indirectly publish a false, deceptive, or misleading advertisement about home improvement;

Again, the Respondent continued to advertise that she was available to do home improvement work after she was suspended on October 25, 2013. The advertising certainly was misleading because she could not legally perform such work.

Concerning the advertisements, the Respondent testified credibly that she simply did not think of the advertisements when she was suspended. Additionally, the advertisements were

paid for in the summer of 2013, long before the suspension. Nevertheless, she did violate the statutes, although I find not intentionally.

Penalties

Summary of the violations

The MHIC has proven, by a preponderance of the evidence, the following violations:

1. Often failing to perform home improvement contracts, in this matter failing to perform contracts with Complainants Fuller, Morriss, and Rando in violation of Md. Code Ann., Bus. Reg. §8-311(a)(6) & (11) –
2. Abandoning or failing to perform, without just cause, a home improvement contracts with Complainants Fuller, Morriss, and Rando in violation of Md. Code Ann., Bus. Reg. §8-605(1).
3. Receiving a deposit of more than one third of the contract price in contracts with Complainants Bosley (two contracts), Fitzgerald, Fuller, and Morriss (five contracts) in violation of Md. Code Ann., Bus. Reg. § 8-617(b).
4. Operating as a home improvement contractor without a home improvement license by advertising her availability to perform home improvement contracts after her suspension in violation of Md. Code Ann., Bus. Reg. §8-301(a).
5. Acting or offering to act as a contractor without a contractor’s license by advertising her availability to perform home improvement work after her suspension in violation of Md. Code Ann., Bus. Reg. §8-601(a).
6. Publishing a false, deceptive, or misleading advertisement about home improvements by advertising her availability to perform home improvement contracts after her suspension in violation of Md. Code Ann., Bus. Reg. §8-610(a)(1).

Violations for abandoning or failing to perform

Pursuant to Section 8-311(a) the following penalties are possible for violations of Md. Code Ann., Bus. Reg. §8-311(a)(6) & (11) and Md. Code Ann., Bus. Reg. §8-605(1):

(a) *In general.* — Subject to the hearing provisions of § 8-312 of this subtitle, the Commission may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee or the management personnel of the applicant or licensee:

- ...
- (11) violates this title;
- (12) attempts to violate this title[.]
- ...

...
(c) *Penalty.* — Instead or in addition to reprimanding a licensee or suspending or revoking a license, the Commission may impose a civil penalty under § 8-620 of this title.

Section 8-620 on the other hand, provides that the Commission may impose a civil penalty for any violation of Title 8 of the Business Regulation Article. Specifically, Section 8-620 states:

(a) In general. The Commission may impose on a person who violates this title, including § 8-607(4) of this subtitle, a civil penalty not exceeding \$5,000 for each violation, whether or not the person is licensed under this title.

(b) Considerations. In setting the amount of a civil penalty, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the complainant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

The violations of §8-311(a)(6) & (11) and §8-605(1) are essentially for the same acts, *i.e.* abandoning or failing to complete home improvement contracts. There were three such contracts not completed, those for Complainants Fuller, Rando, and Morriss. I believe a civil penalty of \$500.00 for each of the three violations (a total of \$1,500.00) is appropriate.

Violations for Accepting Deposits in Excess of One Third

There were five contracts where the Respondent accepted deposits in excess of the permitted amount. Section 8-620 allows a penalty of up to \$5,000.00 per violation of §8-617. I believe a civil penalty of \$500.00 for each of these five violations is appropriate for a total of \$2,500.00.

Violations for Improper Advertising

Three statutes, Md. Code Ann., Bus. Reg. §8-301(a), §8-601(a), and §8-610(a)(1), were violated when the Respondent advertised her availability to perform home improvement contracts after she had been suspended. These statutes are nearly identical and I shall treat their violations as one. An appropriate civil penalty of \$1,000.00 is appropriate, pursuant to §8-620.

I recommend therefore that civil penalties totaling \$5,000 be imposed on the Respondent as follows:

| | |
|--|------------------|
| 1. Failing to complete or abandoning contracts | \$1,500.00 |
| 2. Accepting excess deposits | 2,500.00 |
| 3. Offering to do business after suspension | <u>+1,000.00</u> |
| | \$5,000.00 |

Considerations

I have considered those issues set out in §8-620(b)(1)-(6) and I do not agree with Mr. Martin that revocation of the Respondent's license is appropriate. Neither do I believe that continued suspension of her license is warranted.

Seriousness of the Violation

The violations are certainly serious. However, there are several mitigating circumstances. First, all except one of the Complainant's has been made hold in that they have been refunded whatever deposits they made. Admittedly the refunds were not made until after complaints were made. As to the refund for Mrs. Bosley, that has been offered but rejected because of the Respondent's claim that she is entitled to liquidated damages. I believe the Respondent has a legitimate position but, as mentioned, that issue is not before me. I trust that the parties can resolve that issue themselves, especially with input from counsel. The seriousness is also mitigated by the Respondent's need to attend to her seriously injured son, discussed more fully later.

So, although there are mitigating circumstances, the Respondent is rightfully called to task with regard to these violations. Much, if not all, of the issues in this case could have been avoided had the Respondent simply spoken to the Complainants. Some of the Complainants have expressed concern for the Respondent because of the situation with her son and I feel certain that she could have tapped into this concern by contacting those involved. I do not believe for a moment that the Respondent was unaware of the numerous telephone calls or complaints.

Good Faith of the Respondent

This issue presents both positive and negative elements. As mentioned, all of the Complainants have been reimbursed except for Mrs. Bosley, and she has been offered some reimbursement. None of the Complainants were precluded from filing claims against the MHIC Guaranty Fund. On the negative side, the Respondent could have avoided all of these issues by contacting the Complainants in a timely manner and by refunding deposits prior to complaints being filed. Additionally, I do not believe the Respondent was completely forthright in suggesting that she was unaware of complaints. This is demonstrated in part, in my view, by the fact that she failed to bring the legal pads to the hearing. The legal pads apparently listed a number of complaints. Regardless of what was on the legal pads, she made a point of stating that she "grabbed" them from Jackie Franklin while Mrs. Franklin was on the telephone with Mrs. Bosley. I am therefore suspicious of what was actually listed on the pads.

Previous Violations

The MHIC presented no evidence concerning the Respondent history of violations and it made no claim of anything untoward in her history. I assume therefore that the charges in this matter are the first ever filed against the Respondent. That is certainly to her benefits in determining what sanctions should be imposed.

Harmful Effect of the Violations

I find that none of the Complainants were financially harmed. Certainly it was stressful for the Complainants not to have their work done in a timely manner or at all. They have not lost any money. Neither was the public at large harmed to any great degree, even by the misrepresentations in the Respondent's advertising. On the other hand, it does not place the home improvement industry as a whole in a very good light.

Assets of the Respondent

The MHIC presented evidence tending to show that the Respondent was having some financial difficulties during the period in question. No other evidence of the Respondent's financial status was introduced into evidence. I assume that she has continued to have financial difficulties in that she has been unable to perform any home improvement since October 2013.

Other Relevant Factors (The Distraction of the Respondent Due to the Injury to Her Son)

I have explained in the findings of fact what occurred with the Respondent's son in March 2013. Mr. Martin acknowledges that this was certainly a concern for the Respondent and few if anyone would disagree. Traveling to and from Chicago initially and later to and from Shock Trauma and rehabilitation facilities in Maryland as her son was being treated and recuperating clearly was time consuming. More significantly, the stress involved, I believe, was a major reason for the Respondent's inattention to her home improvement business. This does not excuse her actions or lack thereof, but it does mitigate them.

Her suspension since October 2013 has certainly caused a loss of income for the Respondent. This, coupled with the civil penalties I am recommending will suffice to impress upon the Respondent the gravity of her errors. Revocation or an additional suspension of her license would be overly severe and only add to her existing difficulties. I recommend that the current suspension be ended.

I recommend that the Commission assess a total civil penalty of \$5,000.00 on the Respondent and that it end the current suspension.

CONCLUSIONS OF LAW

I conclude the following:

- A. The Respondent violated Md. Code Ann., Bus. Reg. §§8-311(a)(6)-(11), 8-605(1), 8-617(b), 8-301(a), 8-601(a), and 8-610(a)(1).
- B. The Respondent is subject to sanction under Md. Code Ann., Bus. Reg. § 8-620 (Supp. 2011).

RECOMMENDED ORDER

I RECOMMEND the following:

- A. The Maryland Home Improvement Commission find that the Respondent violated Md. Code Ann., Bus. Reg. §§8-311(a)(6)-(11), 8-605(1), 8-617(b), 8-301(a), 8-601(a), and 8-610(a)(1). (Supp. 2011).
- B. The Maryland Home Improvement Commission order the Respondent to pay a total civil penalty of \$5,000.00, pursuant to Md. Code Ann., Bus. Reg. § 8-620 (Supp. 2011).
- C. The records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

May 19, 2014
Date Decision Mailed

D. Harrison Pratt
Administrative Law Judge

DHP/brp
#147861