

CLAIM OF CHARLYNNE O. JOHNSON <sup>1</sup>	* BEFORE MICHAEL DAVID CARLIS,
CLAIMANT,	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND,	* OF ADMINISTRATIVE HEARINGS
REGARDING THE ALLEGED ACTS AND	*
OMISSIONS OF LYLE CROMWELL, T/A	*
CROMWELL AND SON, INC.,	* OAH No.: DLR-HIC-02-12-32208
RESPONDENT	* COMPLAINT No.: 09 (05) 172

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On January 23, 2007, Charlynnne O. Johnson (Claimant) filed a claim with the Maryland Home Improvement Commission (Commission) for reimbursement from the Guaranty Fund (Fund). The claim alleged that Cromwell and Son, Inc., caused an actual loss in the amount of \$69,847.00. On August 8, 2012, the Commission issued a Hearing Order identifying Lyle Cromwell, Jr, t/a Cromwell and Son, Inc., (Respondent) as the responsible contractor and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

---

<sup>1</sup> The Maryland Home Improvement Commission and the Office of Administrative Hearings have misspelled Ms. Johnson's first name, which is spelled with two n's.

On May 20, 2013, the OAH convened a hearing at its offices in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407 (2010).<sup>2</sup> The Claimant represented herself. The Respondent represented himself. Hope M. Sachs, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Commission's Hearing Regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03 and 09.08.03; and COMAR 28.02.01.

### **ISSUES**

The issues are: (1) whether there are or were costs of restoration, repair, replacement, or completion that arose from an unworkmanlike, inadequate, or incomplete home improvement;<sup>3</sup> and, if so, (2) whether the amount of the compensable actual loss is the amount that the Claimant has claimed.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The following were admitted for the Claimant:

Claimant #1: Contract, dated August 6, 2007;

Claimant #2: Financial Recap & Totals form, dated June 4, 2008, with attachments;

Claimant #3: Copies of permits;

Claimant #4: Preliminary Estimate from Above Grade Contracting, Inc., dated January 5, 2009;

---

<sup>2</sup> All subsequent citations to the Business Regulation Article are only to sections, unless otherwise noted.

<sup>3</sup> A "home improvement" means [] the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence[.]” Section 8-101(g)(2)(i).

Claimant #5: Report from JHH Consultant, dated December 15, 2009;

Claimant #6: Cancelled checks and Order forms; and

Claimant #7: List of purchased materials.

The following were admitted for the Respondent:

Respondent #1: Commercial Lease Agreement, dated July 24, 2006;

Respondent #2: Cancelled checks payable to the Claimant;

Respondent #3: Amounts paid to Carl Anthony Construction; and

Respondent #4: Draw requests.

The following were admitted for the Fund:

Fund #1: Memorandum from OAH, dated February 7, 2013, with attachments;

Fund #2: Letter, dated March 12, 2013; and

Fund #3: Claim, with attachment.

### Testimony

The Claimant testified for herself.

The Respondent testified for himself.

The Fund did not offer any witnesses.

### FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Respondent had been licensed by the Commission during all times relevant to this matter.
2. Sometime before August 2007, the Claimant purchased a single family home in Baltimore, Maryland, that needed extensive renovation.

3. On August 6, 2007, the Claimant and Respondent, through Anthony R. O'Donoghue, entered into a home improvement contract.<sup>4</sup> At the time, O'Donoghue represented he worked for or with the Respondent, and the Respondent sanctioned the representation. The Respondent agreed to perform extensive renovations throughout the home. The Claimant agreed to pay \$93,605.00 to the Respondent.

4. The Respondent, through O'Donoghue, began work on the home improvement in August 2007 and continued to perform some work through May 2008, when he stopped all work. The work that was completed included demolition, steps, some framing, and, sometime in December 2009, the Respondent installed windows. Some of this work, including framing and the steps, was structurally deficient. The Respondent stopped all work for an unexplained reason sometime in December 2009.

5. The Claimant paid the Respondent \$57,200.00.

6. Since November 2010, the Claimant has paid \$24,297.00 to other contractors to correct and complete the home improvement.

7. The total cost to correct the inadequate and unworkmanlike home improvement and to complete the home improvement is \$105,165.00.

8. The Claimant filed a claim with the Commission on January 23, 2009. She claimed an actual loss of \$69,847.00.

## DISCUSSION

### General Law

Under Section 8-405(a) (Supp. 2012), the Commission may compensate an "owner . . . for an actual loss that results from an act or omission by a licensed contractor[.]" An "actual

---

<sup>4</sup> A "home improvement contract" is "an oral or written agreement between a contractor and owner for the contractor to perform a home improvement." Section 8-101(h). An "[o]wner" includes a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." Section 8-101(k).

loss” is “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Section 8-401. Under COMAR 09.08.03.03B(2), compensation is “only . . . for actual losses . . . incurred as a result of misconduct by a licensed contractor.”

COMAR 09.08.03.03B governs the measurement of actual loss:

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

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

...

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

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

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

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant’s actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

### Review of the Evidence

#### **The Claimant’s Evidence**

The record contains a contract for home improvement signed on August 6, 2007, by the Claimant and Anthony R. O’Donoghue for the Respondent. By this contract, the Claimant

agreed to pay \$93,605.00 to the Respondent, and the Respondent agreed to perform a complete renovation of the Claimant's home in Baltimore City.

The Claimant testified by explaining several exhibits. According to the Claimant, she obtained a 203K loan to finance the purchase and complete renovation of the home. This Federal Housing Administration loan required a separate contractor to work with her to approve periodic "draws" from the loan amount to pay for the renovations. Claimant #2 shows requests for four draws from the loan that, according to the Claimant's testimony, were received by her and paid to the Respondent. Claimant #2 shows the following draws: (i) \$6,700.00 on August 10, 2007, (ii) \$11,462.00 on September 28, 2007, (iii) \$24,300.00 on December 18, 2007, and (iv) \$26,255.00 on March 21, 2008.

The Claimant testified that she noticed at some point that the home improvement work she had paid for was not done. According to the Claimant, she obtained the service of a City inspector who confirmed that very little work had been done. "Shortly thereafter," testified the Claimant, the Respondent's subcontractor, O'Donoghue, who was performing work under the home improvement contract, "disappeared." The Claimant testified that, after O'Donoghue stopped work on the home improvement, she contacted the Respondent; they met; and the Respondent agreed to help her, but ended up only installing windows at the home in December 2008.

The Claimant also identified Claimant #5 as the report from an investigator who inspected the home improvement at the suggestion of the Commission. Claimant #5 shows that John J. Heyn, a licensed home inspector, inspected the property on December 8, 2009, and reached the following conclusions: First, about twelve percent of the total home improvement contract had been completed and "some of this work is defective and has to be done over."

Second, "if a new contractor is needed to correct and complete this remodeling project as specified in the Work Write-Up it will cost at least \$105,165.00." Finally, the value of the work that had been performed, which included demolition, some framing, and the windows, was \$12,000.00. Photographs that Mr. Heyn attached to the report show substantial incomplete work throughout the home.

The Claimant identified Claimant #4 as an estimate she received from another contractor in January 2009, to correct the inadequate work and to complete the home improvement. Claimant #4 shows that Above Grade Contracting, Inc., (Above Grade) estimated on January 5, 2009, that it would cost \$106,250.00 to correct and complete the home improvement. Of that amount, \$8,398.00 was for the installation of windows and two doors.

The Claimant also identified Claimant #6 as canceled checks for payments she made to contractors for work performed on the home improvement after the Respondent had abandoned the job. Claimant #6 includes fifteen separate payments for \$24,297.00 to carpenters, a Heating Ventilation, and Air Conditioning specialist, and a plumber from November 2010 through February 2012. The Claimant testified that she paid more than that to have other work completed, but was unable to obtain documentation of those payments.

The Claimant also testified that she purchased many items that were needed to complete the home improvement contract. She identified Claimant #7 as an itemized list of the items she had purchased, but she did not offer any receipts or other documents to corroborate the cost of the items.

The Respondent testified that he did not "initiate" the contract. He testified that O'Donoghue signed the contract, and he and O'Donoghue were not partners.

The Respondent also testified that Respondent #2 shows the amount the lender paid to the Claimant based on "draw requests." Respondent #2 consists of copies of five checks made payable to the Claimant as follows: (i) \$3,780.00 on July 12, 2007, (ii) \$6,030.00 on September 5, 2007, (iii) \$10,315.80 on October 23, 2007, (iv) \$21,690.00 on December 27, 20107, and (v) \$23,629.50 on April 21, 2008.

The Respondent testified that Respondent #3 shows what the Claimant paid to Mr. O'Donoghue. Respondent #3 are copies of documents that have either O'Donoghue's or Carl Anthony Construction's name and dollar amount and dates on them as follows: (i) \$1,700.00 on August 23, 2007, (ii) \$6,030.00 on September 11, 2007, (iii) \$5,157.90 on October 30, 2007, (iv) \$5,157.90 again on October 30, 2007, (v) \$10,845.00 on January 8, 2008, (vi) \$10,845.00 again on January 8, 2008, and (vii) \$17,467.00 on May 2, 2008.

When asked what his defense against the claim is, the Respondent testified, "The only defense I have -- is the person on the job was someone I trusted. Me not initiating contract. That's not a defense. It's just a lack of -- poor management. Really, no defense."

### Arguments

#### **The Claimant**

The Claimant argued that the Respondent abandoned the home improvement contract before it was completed and the work that was performed was unworkmanlike. She argues she is due "some" monetary compensation.

#### **The Respondent**

The Respondent "apologize[d]" to the Claimant and "feel[s] she should be compensated but [does not] know how much."



## **The Fund**

The Fund recommended the maximum award of \$20,000.00.

### Analysis

#### **Is the Respondent Responsible for O'Donoghue's Acts and Omissions?**

Section 8-405 (b) of the Business Regulation Article states as follows: "For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists." Although O'Donoghue, not the Respondent, signed the home improvement contract and did most of the work, the following evidence supports attributing O'Donoghue's acts and omissions to the Respondent. The home improvement contract prominently lists "Cromwell and Son, Inc.," at the top of the first page. Furthermore, the home improvement contract identifies the names of the contracting parties in the first paragraph as: "This contract is made for Charlyne Lynne [sic] Johnson, by Cromwell & Son, Inc., Contractor." Also, O'Donoghue signed the home improvement contract under the following: "Contractor Name of Business: Cromwell & Sons [sic], Inc."

In addition to the indicators in the home improvement contract that O'Donoghue was acting for or on behalf of the Respondent, the initial draw request for partial disbursement of the loan on August 10, 2007, was signed by the Claimant as "Owner-Occupied" and the Respondent as "General Contractor[]." Furthermore, the Claimant testified that when she met with O'Donoghue to sign the home improvement contract, he identified himself as the Respondent's partner. Based on this evidence, I find that O'Donoghue acted as the Respondent's salesperson and subcontractor; therefore, under section 8-405 (b), the Respondent's acts and omissions include the acts and omissions of O'Donoghue.

**Was the home improvement inadequate, unworkmanlike, or incomplete?**

No evidence was offered to refute the report from Mr. Heyn. According to Mr. Heyn, “only 12% of the job has been completed, but some of this work is defective and has to be done over.” Furthermore, Mr. Heyn noted the steps on the front porch were inadequate because the “treads . . . are cut too short” and “some of the interior framing is not structurally sound[.]” The photographs attached to Mr. Heyn’s report wholly support his conclusions. Based on this evidence, I find that the Respondent’s work on the home improvement was incomplete, inadequate, and unworkmanlike.

**What is the Claimant’s actual loss?**

Because the Claimant has solicited another contractor to complete and correct the home improvement, COMAR 09.08.03.03B(3)(c) provides for the proper measurement of actual loss as follows:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant’s actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

The Claimant alleged in the claim she filed with the Commission on January 23, 2009, that she paid \$57,202.00 to or on behalf of the Respondent. She certified under penalty of law that the allegations in her claim were true and correct to the best of her knowledge. This is the same amount that the documented in Respondent #3, which the Respondent admitted was paid to O’Donoghue. The Fund, on the other hand, used \$68,717.00 as the amount the Claimant paid to

or on behalf of the Respondent. This amount is partially supported by Claimant #2, which is the 203K-loan's appointed contractor's summary of the disbursements from the 203K loan. The Claimant testified that these disbursements, except the first one on June 14, 2007, were paid to or on behalf of the Respondent. The relevant disbursements total \$68,717.00. Based on the Respondent's admission, the supporting documentation that strongly suggests actual payment, and the Claimant's certified claim in which she alleges at a point in time much closer to the actual event that \$57,202.00 was paid to the Respondent, I find it more likely than not that the Claimant paid \$57,202.00 to or on behalf of the Respondent under the home improvement contract.

The Claimant alleged in the claim that the amount paid or payable to correct and complete the original contract is \$106,250.00. This is the amount of Above Grade's estimate from January 5, 2009. When asked at the hearing about this estimate, the Respondent testified, "I agree with that cost." Mr. Heyn estimated the cost to correct and complete the home improvement to be \$105,165.00, very close to the Above Grade estimate.

I find that the estimate from Mr. Heyn is more likely than not the most accurate cost to correct and complete the home improvement. The Claimant testified that the Respondent installed windows at her home sometime in December 2009. Mr. Heyn inspected the home improvement on December 8, 2009, and found "new windows" that he included in his estimate that the Respondent's work on the home improvement was worth approximately \$12,000.00. The photographs attached to Mr. Heyn's report also show that windows and doors had been installed. The estimate done by Above Grade on January 2009 was done before the windows had been installed and includes \$8,398.00 for the installation of new windows and doors for \$8,398.00.

Based on this reasoning, I find that the cost to correct and complete the home improvement contract is \$105,165.00.<sup>5</sup>

Based on the above discussion, the Claimant's actual loss under COMAR 09.08.03.03B(3)(c) is \$57,202.00 (amount paid to original contractor) + \$105,165.00 (amount to correct and complete the home improvement) = \$162,365.00 – \$93,605.00 (original contract price) = \$68,762.00. However, section 8-405(e) limits an award from the Fund to one claimant to \$20,000.00. Based on this limitation, I recommend an award from the Fund of \$20,000.00 to the Claimant for the misconduct of the Respondent.

### **CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained a compensable actual loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

### **RECOMMENDED ORDER**

I recommend the following:

A. The Maryland Home Improvement Commission **ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00.

B. The Maryland Home Improvement Commission **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).

---

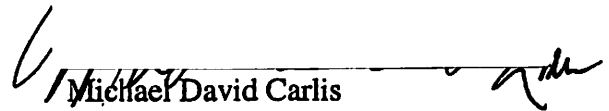
<sup>5</sup> The fact that the Claimant paid \$24,297.00 for work on the contract after Mr. Heyn's estimate does not change the total cost to fix and complete the home improvement contract. Under Regulation .03B(3)(c) that amount is the "reasonable amounts the claimant has paid or will be required to pay." Therefore, the amount the Claimant has already paid (\$24,297.00) is included as actual loss and subtracted from what she will need to pay to complete the home improvement. Therefore, the total amount to correct and repair remains the same as Mr. Heyn's estimate because that amount includes what the Claimant has already paid plus the remaining amount that will have to be paid to finish the correction and completion of the home improvement ( $\$24,297.00 + (\$105,165.00 - \$24,297.00 = \$80,868.00) = \$105,165.00$ ).

C. The records and publications of the Maryland Home Improvement Commission

reflect this decision.

**Signature on File**

August 15, 2013  
Date Decision Mailed

  
Michael David Carlis  
Administrative Law Judge

MDC/  
#144384

**PROPOSED ORDER**

***WHEREFORE, this 25th day of September 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.***

***Joseph Tunney***

***Joseph Tunney, Chairman  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**