

IN THE MATTER OF THE CLAIM OF	* BEFORE JAMES T. MURRAY,
BROWN DOG INVESTMENTS, LLC	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF RONALD HERD, AND	* OAH NO.: DLR-HIC-02-09-24025
TRI-STATE RESTORATION AND	* MHIC NO.: 09 <del>75</del> 388
CONSTRUCTION, LLC	* <i>90</i>

\* \* \* \* \*

**RECOMMENDED DECISION**

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**STATEMENT OF THE CASE**

On September 28, 2008, Brown Dog Investments, LLC (the Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$33,858.23 for actual losses allegedly suffered as a result of a home improvement contract with Tri-State Restoration and Construction, LLC (Respondent). The MHIC referred the claim to the Office of Administrative Hearings (OAH) on June 19, 2009.

I held a hearing on January 21, 2010, at the OAH, Hunt Valley, Maryland in accordance with sections 8-312(a) and 8-407(c)(2)(i) of the Business Regulation Article, Annotated Code of Maryland (2004 & Supp. 2009). Kris King, Assistant Attorney General, represented the Fund.

Laura VanMeter, Esquire, appeared on behalf of the Claimant. No one appeared on behalf of the Respondent or the responsible licensee.<sup>1</sup>

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

### **ISSUES**

1. Did the Respondent and responsible contractor receive notice of the hearing?
2. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's or the responsible contractor's acts or omissions?
3. If the Claimant did sustain an actual loss compensable by the Fund as a result of the Respondent's or responsible contractor's acts or omissions, what is the amount of the actual loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. # 1 - Email from Eran Marcus to [niftywallace@yahoo.com](mailto:niftywallace@yahoo.com), March 2, 2007
- Cl. Ex. # 2 - Customized Proposal for Brown Dog Investment from Advanced Heating & Cooling, April 17, 2007
- Cl. Ex. # 3 - Invoices from Alside, September 7, 17, and 20, 2007, and February 19, 2008
- Cl. Ex. # 4 - Sales Slips from daltile, December 7, 13, and 19, 2007
- Cl. Ex. # 5 - Invoices from Arundel Electrical Services July 17, 2007 and September 10, 2007

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<sup>1</sup> A corporation may not act as a home improvement contractor unless it obtains a corporate home improvement contractor's license through one individual licensed contractor who shall be in responsible charge of the corporation's home improvement work. The corporation or partnership and the individual in responsible charge of the corporation's or partnership's home improvement work shall be jointly and severally responsible for repayment of any payments made to claimants on behalf of the Fund. COMAR 09.08.01.04B and C.

- Cl. Ex. #6 - Proposal from Bruce Combs Drywall, Inc., September 17, 2007; invoice from Bruce Combs Drywall, Inc., October 23, 2007; invoice from Carroll Insulation Company, October 18, 2007; job bid Ehrhardt Quality Plumbing, Inc., July 11, 2007; and The Home Depot Receipts, June 18, 2007, September 5 and 10, 2007, and November 11 and 13, 2007
- Cl. Ex. #7 - Agreement between Tri-State Restoration & Construction Co., LLC and Brown Dog Investment, LLC, May 31, 2006

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

- Fund Ex. # 1 - Memorandum from Sandra L. Sykes to Legal Services, September 29, 2009; Notice of Hearing, September 3, 2009; Hearing Order, June 9, 2009; Envelope
- Fund Ex. # 2 - Licensing Information for Respondent and Ronald Herd, printed January 20, 2010
- Fund Ex. # 3 - Home Improvement Claim Form, September 25, 2008
- Fund Ex. # 4 - Letter from John Borz to Ronald Herd, Tri-state Restoration & Construction Lic, (sic) April 28, 2009
- Fund Ex. # 5 - Copy of check #07297995 from Travelers Indemnity Company, paid June 13, 2006

No exhibits were offered on behalf of the Respondent or the responsible licensee.

#### Testimony

The Claimant presented the testimony of Shaun Chadwick, a principal in Brown Dog Investments, LLC. The Fund did not present any testimony. There was no testimony presented on behalf of the Respondent or the responsible individual.

#### **FINDINGS OF FACT**

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 0087917. The Respondent's license expired April 12, 2008.

2. At all times relevant to the subject of this hearing, the responsible individual for the Respondent was Ronald Herd (Herd). His license also expired April 12, 2008.
3. The Claimant is a real estate investment company. At all times relevant to the subject of this hearing it owned fewer than three properties. One of the properties it owned was 3508 Hickory Avenue in Baltimore City (the property).
4. In early 2006, there was a fire at the property, which Travelers Insurance Co. (Travelers), the Complainant's insurance company, determined caused damages to the property in the amount of \$40,178.64.
5. Based on the recommendation of Travelers, on or about May 31, 2006, the Claimant contracted with the Respondent to perform the repairs to the property.
6. The contract price was \$40,178.64 and included razing the interior of the property and entirely rebuilding it.
7. The Claimant, through one of its officers, Shaun Chadwick (Chadwick), paid the Respondent the entire contract amount by signing over to Herd the June 13, 2006 check for the damages paid to it by Travelers. Herd is the only person from the Respondent that Chadwick or anyone else from the Claimant ever dealt with regarding the contract.
8. Work under the contract began in mid-June 2006 and continued sporadically through July 2006. After that, work under the contract ceased.
9. The Claimant, through Chadwick, made numerous attempts by email and telephone to contact Herd. Chadwick left numerous messages and talked to an office Secretary for the Respondent.
10. On March 17, 2008, Chadwick finally heard from Herd who promised to complete the work under the contract. However, no further work on the contract was performed.

11. The Claimant contacted Travelers who sent an adjuster to inspect the work that had been performed by Herd. The adjuster determined that the value of the work under the contract, which included a footer, roof repairs and framing, was \$6,320.41.
12. The Claimant paid other contractors \$33,858.23 to complete the work under the contract. Work performed to complete the contract included some upgrades over the original contract.
13. On September 25, 2008, the Claimant filed a claim with the MHIC Fund.
14. On April 28, 2009, the MHIC informed "Ronald Herd, T/A Tri-state Restoration & Construction Lic" of the Claimant's claim. Neither Herd nor the Respondent responded to that letter.
15. On September 3, 2009, the OAH sent a Notice of Hearing to Ronald Herd, T/A Tri-State Restoration & Const" by both regular and certified mail. The regular mail Notice was not returned to the OAH by the U.S. Postal Service. The certified mail Notice was returned to the OAH unclaimed.

## DISCUSSION

### **I. Notice to the Respondent and Herd.**

In this case, the Respondent and Herd failed to appear for the hearing. The hearing was scheduled to commence at 10:00 a.m., but did not begin at that time because neither Herd nor a representative for the Respondent were present. When Herd and a representative for the Respondent were still not present by 10:15 a.m., I began the hearing in their absence.

Preliminarily, the Fund presented documents showing that the hearing notice was sent by certified mail and first-class mail to Herd's business address of record with the MHIC and that the first class Notice was not returned to the OAH, but that the U.S Postal Service returned the

certified mail notice as unclaimed. The Fund presented no other evidence that the hearing notice was received by either Herd or the Respondent, although the Respondent's and Herd's licenses had expired by the time of the OAH Notice. No evidence was presented as to whether the letter mailed by the MHIC to Herd was received by the Respondent or Herd.

Section 8-312 of the Business Regulation Article, Annotated Code of Maryland (Supp. 2009) requires that a hearing notice be given to a person at least ten days before the hearing by certified mail to the business address of the licensee on record with the MHIC. That provision also applies to proceedings to recover from the Fund. Md. Code Ann., Bus. Reg. § 8-407(a) (Supp. 2009). The requirements under the contested case provisions of Maryland's Administrative Procedure Act are similar. See Md. Code Ann., State Gov't § 10-209 (2009). Although the evidence is weak and demonstrates a minimal effort on the part of the MHIC, I find that the notice requirements were met in this case.

When notice has been provided in the manner required by statute or regulation, the party to whom the notice has been directed has no legitimate claim that the notice given was inadequate or defective. *State v. Barnes*, 273 Md. 195 (1974). In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter "reached its destination at the regular time and was received by the person to whom it was addressed." (citations omitted). *Bock v. Insurance Comm'r*, 84 Md. App. 724, 733 (1990). Even testimony that the addressee did not receive the letter does not conclusively rebut the presumption of receipt. Instead, the trier of fact must consider that evidence along with all of the other evidence in the case to determine whether the letter was mailed and whether the addressee subsequently received it. *Id.* Accordingly, a receipt indicating notice was delivered to the proper address is all that is necessary to satisfy notice provisions for certified mail. Proof that the addressee actually

received the notice is not required.

The facts and circumstances in this case show that notice of this hearing was mailed to Herd as required by statute. Although he was no longer licensed when the notices were mailed, the regular mail notice was not returned by the U.S. Postal Service. I infer from this that Herd was still residing at his address of record with the MHIC and received the hearing notice.

Although MHIC apparently made no effort to properly serve the Respondent, a corporate entity, through its resident agent or even to determine if it had an address separate from that of Herd, I nevertheless conclude, more probably than not that the Respondent received constructive notice of the hearing. The evidence suggests that Herd was a principal in the Respondent corporation and was the person primarily responsible for handling the Respondent's business affairs. In fact, Herd, as is required, was licensed and in responsible charge of the corporation's home improvement work. COMAR 09.08.01.04. Thus, I conclude the Respondent was also properly notified of the instant proceeding and that the hearing could properly proceed in its absence as well. COMAR 09.01.02.09.

## **II. Merits.**

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor...." Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2009). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2004). For the following reasons, I find that the Claimant has proven eligibility for compensation from the Fund.

The Respondent and Herd were licensed to perform home improvement work at the time they and the Claimant entered into the contract. It was not disputed that the Respondent, through

Herd or anyone else, performed very little work under the May 31, 2006 contract. Work under the contract began as contemplated, but continued only sporadically. Chadwick attempted to contact the Respondent through Herd and even left messages with an employee, all to no avail. When Chadwick finally successfully contacted Herd, Herd told him that he had broken his jaw, which is why he had not worked regularly. Nevertheless, Herd stated that he would be completing the contract. That promise was disingenuous. Despite renewed efforts by Chadwick, Herd never did any more work under the contract. At the point Herd stopped work, he had only poured a foot, made some roof repairs and erected some framing. According to the only evidence on the issue, the value of that work performed by Herd was only a little over \$6,300.00. The Respondent and Herd were thus responsible for an incomplete home improvement and the Claimant has proven eligibility for compensation from the Fund for its actual damages.

Having found eligibility for compensation, I now turn to the amount of the award, if any. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case. The contract in this case was extremely vague and it is clear that the Claimant added some minor upgrades to the original work. Conversely, it is also clear that the scope of the work under the contract included razing the entire interior of the property and completely rebuilding it, as well as repairing the roof. As it was unchallenged, I accept Chadwick's testimony regarding the value of the work performed under the contract.

Using the formula set forth in COMAR 09.08.03.03B(3)(c), I calculate the Claimant's actual loss as follows:



Amount paid to original contractor	\$40,178.64
Cost to correct or complete	<u>+33,858.23</u>
	70,036.87
Minus original contract price	<u>- 40,178.64</u>
(Actual loss)	\$33,858.23

The loss reflected above is slightly higher than the Claimant's actual loss because of some minor up-grades to the project. Those up-grades, however, were minor and do not amount to anywhere near the \$13,858.23 that the Claimant cannot recover from the Fund. The limitation of recovery from the Fund is \$20,000.00 for one claimant from one contractor. Md. Code Ann., Bus. Reg. § 8-405(e) (1) (Supp. 2009). Accordingly, the Claimant is entitled to an award from the Fund in the amount of \$20,000.00.

#### CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$33,858.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

#### RECOMMENDED ORDER


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

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

**ORDER** that the Respondent and Herd be ineligible for Maryland Home Improvement Commission licenses until the Respondent and/or Herd 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 (2004); and

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

March 25, 2010  
Date Decision Mailed

  
James T. Murray  
Administrative Law Judge

JTM  
# 112129

PROPOSED ORDER

*WHEREFORE, this 26th day of April 2010, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.*

*I. Jean White*

*I. Jean White  
Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**