

<p>IN THE MATTER OF THE CLAIM</p> <p>OF THOMAS O’CONNOR AND</p> <p>MARY O’CONNOR,</p> <p>CLAIMANTS</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF</p> <p>HEATHER DONALDSON, T/A AAA</p> <p>ASAP WATERPROOFING</p> <p>RESPONDENT</p>	<p>* BEFORE EILEEN C. SWEENEY,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-14-13086</p> <p>* MHIC No.: 14 (90) 139</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 30, 2014, Thomas and Mary O’Connor (Claimants) filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,300.00¹ in alleged actual losses suffered as a result of a home improvement contract with Heather Donaldson t/a AAA Asap Waterproofing (Respondent).

¹ The claim amount entered on the form was “\$3,200.00 + \$7,100.00 to repair.” (Fund Ex. 5.)

On February 20, 2015, I held a hearing at the Bel Air Branch Library, 100 E. Pennsylvania Avenue, Bel Air, Maryland.² Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 & Supp. 2014). Claimant Mary O'Connor represented the Claimants.³ Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Neither the Respondent, nor anyone authorized to represent her, appeared at the hearing.⁴

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

CL Ex. 1A-1E	Photographs
CL Ex. 2	January 7, 2014 Basement Waterproofing Nationwide, Inc., estimate
CL Ex. 3	January 10, 2014 Bel Air Waterproofing estimate

² A hearing scheduled for November 7, 2014 was postponed at the Respondent's request due to a documented transportation issue.

³ As only Ms. O'Connor appeared at the hearing, I will refer to her in this Decision as the Claimant.

⁴ After determining that proper service was made (the Notice of Hearing was mailed to the Respondent at the address contained in the Respondent's licensing information and was not returned as undeliverable), I proceeded to conduct the hearing in the Respondent's absence. COMAR 28.02.01.23A.

- CL Ex. 4 June 9, 2012 contract between the Claimants and the Respondent
(Contract)
CL Ex. 5 Undated Dry Basement Certificate from the Respondent

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

- Fund Ex. 1 August 19, 2014 Notice of Hearing; March 31, 2014 Hearing Order; certified mailing returned as undeliverable on September 24, 2014
- Fund Ex. 2 The Respondent's licensing information
- Fund Ex. 3 January 12, 2015 Notice of Hearing
- Fund Ex. 4 State Department of Assessments and Taxation (SDAT): Real Property Search, printed on October 10, 2014
- Fund Ex. 5 February 5, 2014 letter from the MHIC to the Respondent, with attached January 28, 2014 Home Improvement Claim Form

Testimony

The Claimant testified on behalf of the Claimants.

The Fund did not present the testimony of any witnesses.

PROPOSED 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 numbers 01-98995 and 05-127203.
2. Prior to June 9, 2012, the Claimants had problems with water leaking into their basement.
3. On June 9, 2012, the Claimants and the Respondent entered into a Contract for the Respondent to perform the following home improvement to the Claimants' basement:
 - Cut out damaged dry wall and haul away
 - Install drain tiles, weep hole, splash plate, and stones
 - Re-cement floor
 - Install sump well in closet area
 - Run discharge line
 - Install sump pump

- Clean mold where present
- [Apply] Fosters 40/80
- Clean-up, haul away debris

4. The Contract did not state when work would begin or end.

5. The agreed-upon contract price was \$3,200.00.

6. The Claimants paid the Respondent a deposit of \$1,200.00, and then paid the balance of \$2,000.00 upon completion.

7. The Respondent began and completed the work in June 2012. She gave the Claimants a Dry Basement Certificate giving “an unconditional Life-Time Guarantee to the entire linear feet of system against seepage.” (CL Ex. 5.)

8. Approximately nine months after the work was completed by the Respondent, the Claimants’ basement started to leak again. The Claimants repeatedly tried to contact the Respondent who did not respond until mid-June 2013.

9. The Respondent agreed to come to the Claimants’ home on July 26, 2013, but did not show up. The Respondent’s representative told the Claimants that she was busy on another job and scheduled another appointment with them for July 29, 2013. The Respondent failed to show up for that appointment as well as subsequently scheduled appointments for August 20, 2013, September 10, 2013, October 4, 2014, and November 5, 2014. When the Claimants called the Respondent’s place of business, they were given multiple excuses, *e.g.*, there had been a misunderstanding, and someone else had taken over the company.

10. The Claimants’ basement continues to leak. Since the leaking began, the Claimants have had to use a dehumidifier, the floors have lifted, a wall has cracked, and mold has developed on the baseboards, walls, and floors.

11. The cost to repair poor work done by the Respondent is \$2,200.00.

DISCUSSION

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2014). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). 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 (2010). For the following reasons, I find that the Claimants have proven eligibility for compensation.

License

Initially, I find that the Respondent was a licensed home improvement contractor at the time she entered into the contract with the Claimants, based on the licensing information submitted into evidence by the Fund.

Unworkmanlike, Inadequate Home Improvement

This case relates to a June 9, 2012 Contract between the Claimants and the Respondent, in essence, to waterproof the Claimants’ leaky basement. The Contract included cutting out damaged dry wall and hauling it away; installing drain tiles, a weep hole, a splash plate, and stones; re-cementing the floor; installing a sump well in a closet area; running a discharge line; installing a sump pump; cleaning up mold and applying disinfectant; clean-up; and hauling away debris.

The Claimant testified that approximately nine months after the Respondent completed the work, water began to again leak into the basement. The Claimants called the Respondent numerous times over the next months, setting up appointment after appointment, with the Respondent offering repeated excuses and never showing up. In the meantime, the Claimants

had to use a dehumidifier, the floor in the basement lifted, and mold developed on the flooring, baseboards and walls.

The Claimant testified that the Claimants paid the full contract price (\$3,200.00).

The Claimant presented as a competent individual with good recall of the dates in question. The Claimant's testimony providing a detailed explanation of the problems in the Claimants' basement since the work was completed, along with photographs she submitted into evidence, clearly established water is entering the basement, the floor in the basement is pulling away, a wall has cracked, and there is mold on the flooring, baseboards and walls.

The Claimant presented no expert testimony from a home improvement contractor or waterproofing contractor. I find that such testimony was not necessary in this case, however. I believed the Claimant's testimony that water is coming into the basement, a condition for which the Claimants had contracted with the Respondent to remedy. In addition, I note that the Respondent gave the Claimants a "Dry Basement Certificate," containing "an unconditional Life-Time Guarantee to the entire linear feet of system against seepage." (CL Ex. 5.)

Furthermore, the Respondent did not appear at the hearing to refute the Claimants' case.

Award

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimants are entitled.

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. Md. Code Ann., Bus. Reg. § 8-405 (e)(1), (5) (Supp. 2014). In addition, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1).

In this case, the Claimant submitted into evidence estimates from two waterproofing companies from whom she obtained estimates. Thus, I find that the following formula set forth in the MHIC's regulations offers an appropriate measurement to determine the amount of actual loss in this case.

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.

COMAR 09.08.03.03B(3).

One of the estimates presented by the Claimant was from Bel Air Waterproofing in the amount of \$7,400.00 and one was from Basement Waterproofing Nationwide, Inc., in the amount of \$9,300.00. The former contained five different categories in its estimate, each with its own estimated cost; only one category (with an estimated cost of \$1,700.00) related solely to the work initially performed by the Respondent. The other categories related primarily to the cost to repair damage caused by the water and moisture in the basement, as well as spraying with mold remediation solution. Thus, I am unable to determine the exact cost associated with repairing the Respondent's work according to that estimate.

The latter estimated was broken down into two parts: (1) repairs to the waterproofing system, costing \$2,200.00; and (2) "[r]ebuild," including drywall repair, paint, and removing/replacing, and laminating the floor, costing \$7,100.00. I may consider only the estimate of \$2,200.00 in calculating the Claimant's award from the Fund, however, because the Fund may not compensate a claimant for consequential damages. COMAR 09.08.03.03B(1).

Thus, using the formula set forth above, I calculate the Claimant's actual loss compensable by the Fund as follows:

Amounts Claimants paid to Respondent under original contract	\$3,200.00
Plus reasonable amounts Claimants will be required to pay another contractor to repair poor work done by Respondent under original contract	<u>+2,200.00</u>
	5,200.00
Less original contract price	<u>-3,200.00</u>
Actual Loss	\$2,200.00

Accordingly, I find that the Claimants may recover \$2,200.00 from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$2,200.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2010 & Supp. 2014).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$2,200.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

April 21, 2015
Date Decision Issued

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#155650

PROPOSED ORDER

WHEREFORE, this 5th day of June, 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION