

CLAIM OF JILL A. COKER	* BEFORE WILLIAM SOMERVILLE,
AGAINST THE MARYLAND HOME	* AN ADMINISTRATIVE LAW JUDGE
IMPROVEMENT GUARANTY FUND	* OF THE MARYLAND OFFICE
FOR VIOLATIONS ALLEGED	* OF ADMINISTRATIVE HEARINGS
AGAINST KENNETH BURR	*
T/A	* OAH NO.: DLR-HIC-02-15-25791
BURR BUILDING & REMODELING	* MHIC NO.: 15 (05) 233
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On February 18, 2015, Jill A. Coker (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of funds for actual losses suffered as a result of home improvement work performed by Kenneth Burr t/a Burr Building & Remodeling (Respondent), a contractor who holds an MHIC license.

I held a hearing on January 4, 2016 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).<sup>1</sup> Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent failed to appear.

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<sup>1</sup> Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

The Respondent was properly notified at his last known address, but he failed to appear. The absence of the Respondent was addressed as a preliminary matter and the hearing proceeded without the Respondent. Md. Code Ann., Bus. Reg. §8-312(h).

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01, and 28.02.01.

### **ISSUE**

Did the Claimant sustain an “actual loss” compensable by the Fund as a result of the acts or omissions of the Respondent, and if so, what is the amount of the compensable “actual loss”?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits offered by the Claimant:

1. Contract document and check, 4-11-2014
2. Second contract document and check, 4-29-2014
3. Summary-of-testimony document
4. Packet of four photographs
5. Note, 1-12-2015
6. Note, 7-8-2014
7. List of items, undated
8. Home Depot account statement, 5-8-2014

I admitted the following exhibits offered by the Fund:

1. Hearing Order mail
2. OAH Notice

3. Hearing Order
4. Licensing History
5. Affidavit, 11-6-2015
6. Claim Form, 2-18-2015
7. Note, 3-10-2015

Testimony

Larry Tyson (qualified to offer opinions in the field of “home improvement, generally”) and the Claimant testified in the Claimant’s case.

The Fund called no witnesses.

**FINDINGS OF FACT**

Upon considering demeanor evidence, testimony, and other evidence offered, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent held an MHIC contractor license. He traded as “Burr Building & Remodeling.”
2. On April 11, 2014, the Claimant and the Respondent entered into a home improvement contract in which the Claimant would pay \$10,670.00 and the Respondent was to remodel a kitchen, install new cabinets, install new counter tops, spray paint a tub in a bathroom, and repair some damaged flooring on the first floor of a house. The house, located in Silver Spring, was property that had been inherited by the Claimant. Work was to begin on April 28, 2014. Payment would be made by a check at the time of the contract for \$3,556.00 and the balance was to be paid through the Respondent’s use of the Claimant’s Home Depot credit card, to the extent of the outstanding balance.
3. On April 11, 2014, the Claimant tendered a check to the Respondent and she gave him the Home Depot credit card.

4. On or before April 27, 2014, the Respondent had moved a gas line for a stove, removed existing kitchen cabinets, removed some wallpaper, patched some holes or dents in the walls with drywall compound, and scraped around some windows.
5. On April 29, 2014, the Claimant and the Respondent entered into a second contract. The Claimant was to pay \$5,400.00 and the Respondent was to remove all of the wallpaper in the house, repair some drywall, prepare and paint the interior of the house, re-install some paneling, spray paint electrical outlets and install new outlet covers, and paint the shutters on the front of the house. The Claimant paid \$2,700.00 by check at the time of the contract, and was to pay an additional \$2,700.00 once the property was sold.
6. No work was performed after April 27, 2014. The Respondent abandoned the project.
7. Between April 29, 2014, and May 21, 2014, the Claimant attempted to contact the Respondent without success.
8. Thereafter, the Claimant paid the balance, \$5,673.29, on the Home Depot credit card and closed that account. All of the charges had been incurred by the Respondent.
9. The value of all the work performed by the Respondent under the two contracts was \$800.00. (Testimony of the Claimant's witness.)
10. On February 18, 2015, the Claimant filed a claim with the Fund.

#### 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)(2014); 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. In addition, with regard to incomplete performance, a contractor is prohibited from abandoning, or failing to perform a home improvement contract

without justification. Md. Code Ann., Bus. Reg. § 8-605(1); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”).

A claimant has the burdens of production and persuasion to establish the "inadequate, incomplete or unworkmanlike" work product of the contractor, as well as to establish the cost of the "actual loss." Md. Code Ann., Bus. Reg. § 8-407(e).

In the instant case, the Claimant has clearly demonstrated an instance in which the Respondent, a licensed home improvement contractor, abandoned and failed to perform the two home improvement contracts and otherwise left incomplete work product. (Finding of Fact 6.) Of the total value of both contracts, \$16,070.00, the Respondent only completed work valued at \$800.00. (Findings of Fact 2, 5, and 9.) Md. Code Ann., Bus. Reg. §§ 8-401 and 8-605(1).

The Claimant not only needs to prove the inadequate, incomplete, or unworkmanlike work product, but she must also prove the “actual loss.” Md. Code Ann., Bus. Reg. § 8-401. “Actual loss” can include the cost to complete such a project. *Id.* In the instant case, the proof was clear. The Respondent charged certain amounts for certain work and did not complete that work. Under the two contracts, the Claimant paid \$11,929.29 to the Respondent, or on behalf of the Respondent, but the Respondent only produced \$800.00 worth of home improvement work. (Findings of Fact 2, 5, 8, and 9.)

Having determined that the Claimant has shown that the Respondent was responsible for unworkmanlike, inadequate, or incomplete home improvement work with regard to the project, further analysis of an amount of “actual loss” is appropriate. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest. COMAR 09.08.03.03B(1). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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 measurements accordingly.

COMAR 09.08.03.03B(3).

In the instant case, I am applying the second option. In the instant case, the Claimant did not spend more money on a remedial contractor but instead sold the property "as is" at less than she probably would have obtained had the work been performed. Based on the credible evidence offered, as described above, I calculate the Claimant's actual loss using the formula in COMAR 09.08.03.03B(3)(b) as follows:

\$11,929.29	paid toward the two original contract prices
<u>- \$800.00</u>	value of materials and services provided
\$11,129.29	actual loss

#### **CONCLUSIONS OF LAW**

I conclude that the Claimant has proven that she has sustained a compensable "actual loss" of \$11,129.29 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401.

**PROPOSED ORDER**

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

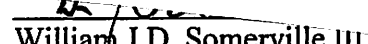
**ORDER** that the Claimant be awarded \$11,129.29 from the Maryland Home Improvement Guaranty Fund; and further

**ORDER** that the Respondent be deemed 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 Commission;<sup>2</sup> and further

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

March 16, 2016  
Date Decision Mailed

**Signature on File**

  
William J.D. Somerville III  
Administrative Law Judge

WS/emh  
#160807

<sup>2</sup> See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 13th day of April, 2016, 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.***

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***Jeffrey Ross***

**Jeffrey Ross  
Panel B**

**MARYLAND HOME IMPROVEMENT COMMISSION**