

IN THE MATTER OF THE CLAIM  
OF KEVIN FALEY,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF KENNETH BURR,  
T/A BURR BUILDING AND  
REMODELING  
RESPONDENT

\* BEFORE MICHAEL J. WALLACE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* OAH No.: DLR-HIC-02-15-25786  
\* MHIC No.: 15(05)336  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On December 5, 2014, Kevin Faley (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) in the amount of \$58,496.00 for reimbursement for alleged actual losses suffered as a result of a home improvement contract with Kenneth Burr, trading as Burr Building and Remodeling (Respondent).

I convened a hearing on December 9, 2015, at the Department of Natural Resources Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).<sup>1</sup> Brian Lyman, Esquire, represented the Claimant. The Respondent failed to appear for the hearing. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), MHIC, represented the Fund.

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 (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.

### ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

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

- Cl. Ex. 1 Deed, dated November 29, 1985
- Cl. Ex. 2 Construction Contract between Respondent and Claimant, dated February 19, 2014, with attached Change Order, dated May 5, 2014
- Cl. Ex. 3 Bank statement, dated February 2014 through March 2014 and cancelled checks from Claimant
- Cl. Ex. 4 Series of sixty photographs showing quality of Respondent's work
- Cl. Ex. 5 Letter and email from Claimant to Respondent, dated June 5, 2014
- Cl. Ex. 6 Contract between Claimant and Clarksville Construction Services (Clarksville), dated June 2, 2014
- Cl. Ex. 7 Copies of checks issued by Claimant to Clarksville in June and July 2014 with attached invoices from Clarksville.

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

- Cl. Ex. 8 Series of eleven photographs showing quality of Clarksville's work
- Cl. Ex. 9 Series of emails between Claimant and Respondent in March 2014 and May 2014 with attachments
- Cl. Ex. 10 Letter from Clarksville to MHIC, dated July 2, 2014

The Respondent did not submit any documents for consideration.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, dated October 20, 2015 with return receipts
- Fund Ex. 2 Notice of Hearing, dated November 17, 2015
- Fund Ex. 3 Hearing Order, dated July 29, 2015
- Fund Ex. 4 The Respondent's licensing history, dated December 8, 2015
- Fund Ex. 5 Affidavit of Hubert Lowery, dated November 6, 2015
- Fund Ex. 6 Home Improvement Claim Form, received December 5, 2014
- Fund Ex. 7 Claim Form cover letter to Respondent, dated December 8, 2015

Testimony

The Claimant testified and presented the expert testimony of Adam August, owner of Clarksville and a home improvement contractor. Mr. August testified as an expert in home improvement estimating and construction. Neither the Respondent nor the Guaranty Fund presented any witness testimony.

**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 number 01-98431.
2. In early 2014, the Claimant wanted to sell his house. To enhance the market value of the house, the Claimant decided to make a series of repairs and improvements to the house.
3. On or about February 27, 2014, the Claimant and the Respondent entered into a contract (the Contract) to remodel, repair and refurbish the Claimant's house located in Columbia, Maryland, including the remodeling of the bathrooms, upgrading electric throughout

the house, painting the interior of the house and the front door, replacing and upgrading flooring, remodeling the kitchen and living room and repairing, power washing and painting an exterior deck.

4. The costs associated with this work were \$27,890.00.

5. Work on the project was to begin three weeks after the first deposit was paid and work was to be completed four weeks after it started.

6. The Claimant paid his first deposit on February 28, 2014 and made an additional four payments in March and April 2014 totaling \$25,831.00.

7. Work began on the project on March 24, 2014, but in April 2014, the Respondent stopped doing any work.

8. The Claimant contacted the Respondent several times and the Respondent promised to return to finish the work.

9. On May 5, 2014, the Claimant and Respondent executed a change order specifying the replacement of toilets, power washing and painting under the exterior deck, installing new drywall and baseboards in the living room, installing hardwood floors throughout the remainder of first floor and replacing door knobs.

10. The additional costs associated with this change order were \$4,235.00 bringing the total Contract amount to \$32,125.00.

11. The Respondent's crew returned and worked one day on May 16, 2014 but did no work after that date.

12. In May and June 2014, because work on the project was still incomplete, the Claimant sent numerous emails and text messages to the Respondent and the real estate agent

who was selling the house. The Respondent failed to return any calls or come back to the house to complete any of the work.

13. The Claimant sent his last letter to the Respondent on June 5, 2014 via certified mail.

14. At that point, the work on the project was either incomplete or was poorly done and had a value of \$2,500.00.

15. On or about May 28, 2014, the Claimant contacted Clarksville in order to obtain an estimate for repairing and completing the work described in the Contract.

16. On June 3, 2014 the Claimant and Clarksville entered a contract whereby Clarksville agreed to repair the work already done by the Respondent and to complete the work that the Respondent left incomplete. Clarksville agreed to do this work at a cost of \$29,715.00.

17. Clarksville was also to perform additional work that was not contracted to the Respondent, including the replacement of the front door (\$2,850.00), replacement of part of the exterior deck (\$500.00), Painting the utility area in the basement (\$600.00) and power washing the front sidewalk and stucco (\$500.00) for a total of \$4,450.00 in extra expenses.

18. The Claimant paid Clarksville a total of \$32,665.00, of which \$29,715.00 was associated with the work under the Contract.

19. Clarksville completed work on the project on June 25, 2014.

## DISCUSSION

### Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a). On September 28, 2015, October 20, 2015 and November 17, 2015, the

OAH mailed several Notices to the Respondent using his address of record with the MHIC. Each of the Notices advised the Respondent that a hearing on the Claimant's claim against the Fund was scheduled for December 9, 2015, that it would begin at 10:00 a.m., and would be held at the Department of Natural Resources at 580 Taylor Avenue, Annapolis, Maryland 21401. The Respondent failed to accept delivery of any of the Notices. The address on the most recent Notice, however, is the Respondent's address of record according to records of the Motor Vehicle Administration. As such, it is presumed that the Respondent received adequate notice of the hearing.

On December 9, 2015, I convened the hearing in accordance with the Notice. The Respondent, however, failed to appear for the hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear. Since the Respondent received due notice of the hearing, I conclude that he was afforded an opportunity to participate in the hearing, but failed to appear. Accordingly, I found it appropriate to proceed in the Respondent's absence.

#### Merits of Claimant's Claim

A homeowner 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). *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." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements on the Claimant's home.

It is undisputed that prior to February 27, 2014, the Claimant decided to sell his house, located in Columbia, Maryland, which was his primary residence. The Claimant wanted to enhance the market value of the house by repairing certain areas of the home and upgrading others. The Claimant presented credible testimony to establish that in February 2014, he and the Respondent entered into the Contract to remodel, repair and refurbish the Claimant's house including the remodeling of the bathrooms, upgrading electric throughout the house, painting the interior of the house and the front door, replacing and upgrading flooring, remodeling the kitchen and living room and repairing, power washing and painting an exterior deck. The costs associated with this work were established at \$27,890.00. Work began on the project on March 24, 2014 and was to be completed in four weeks but in April 2014, the Respondent stopped doing any work. The Claimant paid his first deposit on February 28, 2014 and made an additional four payments in March and April 2014 totaling \$25,831.00. When the Respondent stopped coming to the house to do any work, the Claimant contacted him several times to ascertain why the Respondent ceased doing any work. Each time the Respondent promised to return to finish the work.

The Claimant further testified that in May 2014, the Respondent returned and executed a change order with the Claimant adding to the original Contract the replacement of toilets, power washing and painting under the exterior deck, installing new drywall and baseboards in the living room, installing hardwood floors throughout the remainder of first floor and replacing door knobs. The additional costs associated with these changes were \$4,235.00 bringing the total

contract amount to \$32,125.00. The Respondent's crew returned and worked one day on May 16, 2014 but did no work after that date.

In May and June 2014, because work on the project was still incomplete, the Claimant continued to send numerous emails and text messages to the Respondent and the real estate agent who was selling the house. He sent the last letter on June 5, 2014 via certified mail but the Respondent failed to return any calls or come back to the house to complete any of the work. At that point, because the work on the project was either incomplete or was poorly done, it only had a value of \$2,500.00.

The Claimant, however, wanted to get the work on the house completed in order to sell it so at the end of May 2014, the Claimant contacted Adam August, a home improvement contractor who owned Clarksville, in order to obtain an estimate for repairing and completing the work contracted to the Respondent.

On June 3, 2014 the Claimant and Clarksville entered a contract whereby Clarksville agreed to repair the work already done by the Respondent and to complete the work that the Respondent failed to finish at a cost of \$29,715.00. Clarksville was also to perform additional work that was not contracted to the Respondent, including the replacement of the front door, replacement of part of the exterior deck, painting the utility area in the basement and power washing the front sidewalk and stucco for a total of \$4,450.00 in extra expenses not included in the original contract with the Respondent. The Claimant paid Clarksville a total of \$32,665.00, of which \$29,715.00 was associated with the work contracted to the Respondent, and Clarksville completed work on the project on June 25, 2014.

I found the testimony of the Claimant to be detailed and credible. In addition, he presented the testimony of Mr. August, the owner of Clarksville, who testified credibly as to the



condition of the house at the time the Respondent abandoned the project. He stated that the house was a mess when he first observed it and testified that that much of the interior had been demolished, open paint cans and garbage were strewn throughout the house, wood planks to be used as new flooring were left outside and were ruined, trim materials were scattered throughout the house, the walls had only one coat of paint and were not properly prepared before paint was applied, and new kitchen appliances purchased by the Claimant for installation were left haphazardly throughout the house with dust and debris scattered on top of them. Mr. August testified that the most of the work done by the Respondent needed to be redone and estimated the value of his work and materials to be only \$2,500.00.

The Respondent did not refute the claims of the Claimant and Mr. August as he was not present during at the hearing, despite being notified of the hearing. I find, therefore, that the Respondent abandoned the job and left the work incomplete. Thus, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula 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. 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.

COMAR 09.08.03.03B(3)(c).

The Claimant's actual loss is calculated after considering that the Claimant contracted with the Respondent for a total amount, with change orders, in the amount of \$32,125.00 but only paid \$25,831.00. The Respondent performed work that had a value of only \$2,500.00 before he abandoned the project. The Claimant hired another contractor to complete and repair the Respondent's work and paid \$32,665.00, but of that amount, \$28,209.00 was associated with the work contracted to the Respondent. The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of a claimant to a respondent. Md. Code Ann., Bus Reg. §8-405 (e)(1), (5).

The award from the fund is, therefore, computed as follows:

Amount paid to the Respondent	\$25,831.00
Amount paid to complete/repair work contracted to Respondent	<u>+28,209.00</u>
Subtotal	\$54,040.00
Original contract price	<u>- 32,125.00</u>
Award amount	\$ 21,915.00

As noted above, 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 Claimant to the Respondent. Here, the actual loss as computed above at \$21,915.00 exceeds \$20,000.00 by \$1,915.00. Accordingly, the Claimant is entitled to the maximum reimbursement from the Fund of \$20,000.00. Md. Code Ann., Bus Reg. §8-405 (e)(1).

#### **PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

**RECOMMENDED ORDER**

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

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

**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;<sup>2</sup> and

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

**Signature on File**

February 10, 2016  
Date Decision Issued

\_\_\_\_\_ <sup>YKS</sup>  
Michael J. Wallace  
Administrative Law Judge

MJW/da  
# 160368

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