

IN THE MATTER OF THE CLAIM * **BEFORE JAMES W. POWER,**
OF HELEN KELLY AGAINST THE * **AN ADMINISTRATIVE LAW JUDGE**
MARYLAND HOME * **OF THE MARYLAND OFFICE**
IMPROVEMENT GUARANTY FUND * **OF ADMINISTRATIVE HEARINGS**
FOR THE VIOLATIONS OF * **OAH NO.: DLR-HIC-02-10-30779**
ROBERT H. DEESE, T/A * **MHIC NO.: 08 (75) 749**
ROBERT HOWARD DEESE *

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On February 9, 2010, Helen Kelly (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$26,670.00 for actual losses suffered as a result of the acts or omissions made by Robert H. Deese, t/a Robert Howard Deese (Respondent).

I conducted a hearing on January 31, 2011 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimant was present and was

represented by Leland Moore, Esquire. The Respondent did not appear for the hearing after being properly notified.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; and COMAR 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?

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits, which I admitted into evidence:

Fund Ex. #1	Notice of Hearing
Fund Ex. #2	Notice of Hearing
Fund Ex. #3	Licensing Printout from MHIC
Fund Ex. #4	Complaint Letter to Respondent

The Claimant submitted the following exhibits into evidence:

Cl. Ex. #1	Copy of Deed
Cl. Ex. #2	Contract with Respondent
Cl. Ex. #3	Claim Form
Cl. Ex. #4	Photographs
Cl. Ex. #5	Photographs
Cl. Ex. #6	Estimate from Henderson Services
Cl. Ex. #7	Estimate from McNeil Pest Control
Cl. Ex. #8	Report of John Heyn
Cl. Ex. #9	Photographs from Mr. Heyn's Report
Cl. Ex# 10	Photographs by Claimant

Testimony

The Claimant testified on her own behalf.

The Fund did not present any witnesses.

FINDINGS OF FACT

I find the following 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 license number 3904841 t/a Robert Howard Deese. The current license is due to expire on October 17, 2011.
2. On July 17, 2006, the Claimant and the Respondent entered into a contract for the Respondent to install vinyl siding, vinyl flooring, new kitchen cabinets and countertops, and to repair a roof leak at the Claimant's residence located at 7213 Waldman Avenue, Baltimore, Maryland. The contract price was \$13,000.00. The Claimant ordered \$10,400.00 in change orders, which included installation of a rail and fence, soffit, rebuilding the rear porch, remodeling a bathroom, and other items. The total contract amount was \$23,400.00. The Claimant paid a total of \$23,900.00 to the contractor between July 2006 and May 2007.
3. The siding was loose and bowed. One siding panel fell off the wall. Trim work was uneven. The kitchen island and countertop were not completed. The railing was never completed and the garage door was never fixed. Decking was not properly nailed and the Respondent used the wrong type of nail.
4. The Respondent was supposed to install a concrete pad next to the deck. This work was never done.
5. The contract called for bay window with four windows. The Respondent installed a three window unit.

6. The front rain gutter was set back too far, causing water to spill over the gutter.
7. On the tile work, some tiles were cracked and there was glue oozing from the seams of the tile.
8. The vinyl siding and decking installed by the Respondent are not salvageable and must be replaced.
9. The Respondent did work intermittently until September 2007, when he ceased doing any work at all.
10. The Respondent was notified of the claim and the hearing by regular and certified mail and did not respond to the MHIC or appear for the hearing.

DISCUSSION

Maryland law provides that an owner may recover compensation from the Guaranty 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. 2010). Section 8-401 of the Business Regulation article defines “actual loss” as “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). The burden of proof to establish the unworkmanlike or inadequate home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2010).

The contract in this case called for extensive renovations of the house. As the work continued, the Claimant found it necessary to add items to the contract in order to have the job done properly.

The Claimant testified that there were \$10,900.00 in change orders and cites the page attached to the contract in support of her position. In reviewing this page, I can confirm

\$10,400.00 in additional items which were not included in the main contract. However, there is \$500.00 claimed by the Claimant which is not documented or explained. Therefore, I must conclude that the contract price was \$23,400.00, consisting of the \$13,000.00 from the original contract and \$10,400.00 in change orders.

With respect to the work, Mr. Heyn, who was retained by the HIC, presented a report and explained how the work was poorly done or not done at all. Siding fell off or was bowed. Nailing was improper and the gutter was placed too far back on the roof, causing water to leak. Glue was oozing from the seams of the tile. The job has little value and must be redone.

Mr. Heyn gave an estimate of \$19,500.00 to fix the work. The Claimant provided two estimates of \$25,540.00 and \$26,670.00 to fix the job.

However, Mr. Heyn was candid in his testimony and stated that his estimate was based on a cost estimator used in the construction industry for new work and did not take into account any profit, which would add at least another ten percent to his estimate. Nor did his estimate consider the fact that contractors repairing another contractor's work will usually charge a premium to undertake such a job.

In his report he wrote that the cost to just replace the siding and decking probably exceeds the \$13,000.00 price of the original contract. He also stated that the current cost to fix the entire job is probably closer to the Claimant's two estimates.

Both estimates provided by the Claimant are itemized and include work originally called for in the contract. In the absence of any showing that the contract with the Respondent was unreasonably low, the estimate of \$25,540.00 from McNeil Pest Control, Inc. approximates the cost of the original contract and should serve as the cost to repair the work.

COMAR 09.08.03.03B states in pertinent part:

Measure of Awards from Guaranty Fund.

(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.

The appropriate section to use is section (c). It will cost a total of \$25,540.00 to finish the work called for in the contract and redo the work done by the Respondent.

Amount paid to Respondent	\$23,900.00
Amount needed to finish/repair	<u>\$25,540.00</u>
	\$49,440.00
Minus contract price	23,400.00
Actual Loss	\$26,040.00

This amount must be reduced to the statutory maximum of \$20,000.00.

CONCLUSIONS OF LAW

For the reasons discussed above, I conclude that the Claimants have established by a preponderance of the evidence that the Respondent abandoned and poorly performed home improvement work and that the Claimant suffered an actual loss compensable by the Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and 8-407(e)(1) (2010 & Supp. 2010).


RECOMMENDED ORDER

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

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

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

April 7, 2011
Date Decision Mailed



James W. Power
Administrative Law Judge

JWP/kke
#120572

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PROPOSED ORDER

WHEREFORE, this 2nd day of June 2011, 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.

Rossana Marsh

*Rossana Marsh
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION