

<p>IN THE MATTER OF GLENDA LYTLE, CLAIMANT AGAINST THE MARYLAND HOME IMPROVEMENT COMMISSION GUARANTY FUND FOR THE ALLEGED ACTS OR OMMISSIONS OF BRIAN MAHONEY, t/a ALEXANDER HOMES, INC. RESPONDENT</p>	<p>* BEFORE LATONYA B. DARGAN, * AN ADMINISTRATIVE LAW JUDGE * OF THE MARYLAND OFFICE * OF ADMINISTRATIVE HEARINGS * OAH Case No.: DLR-HIC-02-12-26966 * MHIC Case No.: 10 (90) 1460 * * * * * * *</p>
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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On March 7, 2011, the Claimant filed a claim against the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for actual monetary losses allegedly incurred as a result of the inadequate, incomplete or unworkmanlike home improvement performed by Brian Mahoney (Respondent), t/a Alexander Homes, Inc. On June 12, 2012, the MHIC ordered a hearing to provide the Claimant with the opportunity to prove her claim.

On December 5, 2012, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). The Claimant represented herself. Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. Neither the Respondent, nor anyone authorized to represent him, appeared for the hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant 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 for the Claimant:

- Claimant Ex. 1: February 5, 2007 Contractor Agreement, with attached cancelled checks
- Claimant Ex. 2: May 20, 2010 Claim Form, with attached narrative
- Claimant Ex. 3: Edward J. Reed's Structural Inspection Report, July 3, 2009
- Claimant Ex. 4: Edward J. Reed's Structural Inspection Report, September 9, 2009
- Claimant Ex. 5: The Claimant's Request for Arbitration
- Claimant Ex. 6: The Claimant's September 16, 2010 letter to the MHIC

- Claimant Ex. 7: The Claimant's February 25, 2011 MHIC Fund Claim, with attached narrative and February 22, 2011 proposal from DWL Construction
- Claimant Ex. 8: Collected correspondence between the Claimant and MHIC
- Claimant Ex. 9: GeoDeck Decking Installation Instructions
- Claimant Ex. 10: Photographs

I admitted the following exhibits for the Fund:

- Fund Ex. 1: Notices of Hearing
- Fund Ex. 2: Notice of Hearing, sent to Respondent at 18510 Premiere Lane, Lexington Park, MD 20653
- Fund Ex. 3: Respondent's Licensing history
- Fund Ex. 4: William Banks' November 29, 2012 Affidavit
- Fund Ex. 5: The Respondent's DLLR registration information
- Fund Ex. 6: The MHIC's March 17, 2011 letter to the Respondent
- Fund Ex. 7: Lynn-Michelle Escobar's December 3, 2012 Affidavit

No exhibits were submitted for the Respondent.

Testimony

The Claimant testified and presented the testimony of Edward J. Reed, P.E., whom I accepted as an expert in Structural Engineering, and Edward L. Miller. The Fund did not present witnesses. No one testified on behalf of the Respondent.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was licensed with MHIC as a home improvement contractor. (Fund Ex. 3.)

2. On February 5, 2007, the Claimant entered into a contract with the Respondent for the Respondent to perform certain home improvements at the Claimant's residence at 23734 Kingston Creek Road, California, Maryland (the Property). Specifically, the Respondent was to replace the existing outdoor deck on the Property and to construct a brand-new sunroom. (Claimant Ex. 1.)
3. The total original contract price was \$108,000.00. The Claimant paid a \$1,000.00 deposit when the contract was executed. Under the contract, the Claimant was to make the remaining payment on the contract in installments as follows: \$36,000.00 upon the approval and obtaining of the work permit(s); \$36,000.00 upon the rough framing for the deck and the sunroom; and, \$35,000.00 upon the completion of the job. (*Id.*)
4. The Claimant paid the Respondent a total of \$111,950.00 under the contract. (*Id.*)
5. The Respondent began work at the Property on March 17, 2007 and completed the project on or around May 21, 2007. (Claimant Ex. 7.)
6. At some point in May 2008, the Claimant noticed that whenever there was sustained rainfall, water would pool in several areas of the deck and would not properly drain. The Complainant contacted the Respondent several times in an attempt to have him inspect the problem, but he was unresponsive. (*Id.*)
7. In November 2008, the Claimant had home improvement work performed at the Property by a different contractor. She asked the contractor to inspect the deck to see if he could determine why rain water would not properly drain from the deck. Upon his inspection, the contractor noted that the deck was shifting and appeared to be separating from the house. The Claimant contacted the Respondent for him to come

inspect the problem. Although the Respondent came to the Property, inspected and told the Claimant there was a “simple fix” to the problem, he did not actually attempt any repairs. (*Id.*)

8. At some point between May 2008 and November 2008, the deck railings also began separating from each other. (Claimant Ex. 10.)
9. By March 2009, the problems with water drainage on the deck were so severe that the deck was unusable after any period of sustained rainfall because there were several pools of standing water, approximately 2-3 inches in depth, around the deck. The Claimant made several attempts between May 2009 and June 2009 to contact the Respondent to have him address the problem. He did not respond until sometime in June 2009, at which time he sent a pair of subcontractors to the Property. The subcontractors attempted to alleviate the separation of the deck from the house by reinforcing the support boards, but the deck had separated too far from the house for the attempt to be successful. (Claimant Exs. 7, 10.)
10. In July 2009, the Claimant hired professional engineer Edward Reed to inspect the sunroom and deck. (Claimant Ex. 3.)
11. Mr. Reed conducted an initial inspection on July 3, 2009.¹ Based on his observations, Mr. Reed determined that the deck failed due to problems in its construction for the following reasons:
 - Ledger board² of the deck was not correctly anchored to the building band board of the house, nor was the ledger board properly protected from weather elements
 - The deck was anchored to the house via the brickwork, which is not compliant with building code specifications

¹ Mr. Reed subsequently inspected the Property on September 9, 2009. (Claimant Ex. 4.)

² A ledger board is a piece of timber used to attach joist hinges together. (T.Reed.)

- Anchor bolts were secured at the top of the ledger board, but no anchor bolts were placed at the bottom of the ledger board
- No deck flashing was provided to protect the ledger board from rainfall and other weather elements
- As the ledger board was not protected from weather elements, water flowed behind the ledger board and rusted the anchor fittings, which also weakened the overall connective structure
- As the ledger board was not protected from weather elements, the wood remained damp, which caused the ledger board to curl away from the house, increasing the separation between the house and the deck
- The deck's support beams were not placed in concrete footings, but rather, were simply set inside holes dug into the ground and filled in with dirt under the deck; as a result, the deck was never truly stable in the ground

(T.³ Reed; T. Miller; Claimant Exs. 3, 4, and 10.)

12. The Claimant shared Mr. Reed's inspection report with the Respondent and, in September 2009, at some time between September 1 and September 9, 2009, the Respondent, along with some workers, came to the Property on one occasion in an attempt to correct some of the issues. The Respondent did not return to the Property after September 9, 2009 to correct the problems with the deck.⁴ (T. Claimant; Claimant Ex. 7.)

13. Despite numerous attempts by the Claimant to contact the Respondent and provide him with an opportunity to correct the problems with the deck, the Respondent did not respond to the Claimant after September 2009. (Claimant Ex. 7.)

14. The Claimant attempted to resolve the issue with the Respondent via arbitration, but the Respondent refused to participate in the arbitration process. (Claimant Ex. 5.)

³ The abbreviation "T" stands for testimony.

⁴ The Respondent sent a worker to the Property on one occasion in May 2010, but that individual did not complete any of the repairs recommended by Mr. Reed.

15. On or around February 22, 2011, the Claimant entered into a contractor with DWL Construction (DWL), MHIC License No. 98146, for DWL to remove and replace the deck constructed by the Respondent. The original contract price was \$24,602.00. As a result of various change orders during the project, the Claimant ultimately paid DWL \$35,998.00 to repair the work performed by the Respondent. (Claimant Ex. 7.)

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared for the hearing. On August 14, 2012, the OAH sent a Notice of Hearing (Notice) to the Respondent, via certified mail, return receipt requested, at the following addresses, which the MHIC had on file for him: 18181 Bowles Road, Lexington Park, MD and 21697 Great Mills Lane, Lexington Park MD. The Notice sent to the Great Mills Lane address was returned to the OAH by the United States Postal Service (USPS) as "Not deliverable as addressed – unable to forward". (Fund Ex. 1.) The Notice sent to the Bowles Road address was returned to the OAH by USPS as "Insufficient address – unable to forward". (*Id.*) On September 20, 2012, the OAH sent a Notice to the Respondent at the address of 18510 Premier Lane, Lexington Park, MD, an address verified for the Respondent via a search of the records of the Maryland Motor Vehicle Administration. (Fund Ex. 4.) The Notice sent to the Premier Lane address was not returned to the OAH by the USPS. The Notice advised the Respondent of the time, place and date of the hearing. I, therefore, found that service was proper and that the Respondent was on notice of the hearing. Consequently, I directed that the hearing proceed in the Respondent's absence under section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and Code of Maryland Regulations (COMAR) 09.01.02.07.

The Merits of the Case

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. 2011); *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 (2010).

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant and during the time he performed work at the Claimant’s residence. The evidence – most notably, the persuasive and detailed testimony of Mr. Reed (as articulated in the above Findings of Fact), along with his written report (Claimant Ex. 3), and the photographs taken by the Claimant of the deck (Claimant Ex. 10), which show the separation of the deck railings from one another, the standing water after a rainfall, the improperly anchored support beams, and the improperly attached ledger boards, among other things – demonstrates that the Respondent’s construction of the deck and its attachment to the Claimant’s house was inadequate and unworkmanlike. The deck was not properly constructed and, as a result, the Claimant experienced extensive problems with it that ultimately required its complete removal and replacement by another contractor. Additionally, the Respondent made no meaningful effort to avail himself of the numerous opportunities the Claimant provided him to repair the work. I find that the Claimant is entitled to compensation as a result of the Respondent’s inadequate and unworkmanlike home improvement.

Having found that the Claimant is eligible for compensation, I now turn to the amount of the award, if any. 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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3)(a), (b) and (c). One of those formulas, as follows, offers an appropriate measurement 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).

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Amount Paid to the Respondent	\$111,950.00
Amount Paid to Correct or Complete Work	<u>+\$ 35,998.00</u>
	\$155,948.00
Amount of Original Contract	<u>-\$108,000.00</u>
Amount of Actual Loss	\$ 47,948.00

On October 1, 2010, the Maryland General Assembly amended the governing statute, effective October 1, 2010, to place a limitation on the amount recoverable by a claimant from the Fund. Effective October 1, 2010, the MHIC may not award from the Fund more than \$20,000.00 to one claimant for the acts or omissions of one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2012).

Consequently, although the Claimant's actual loss is calculated at \$47,948.00 under COMAR 09.08.03.03B(3)(c), the Fund recommended an award in the amount of \$20,000.00, which is the maximum amount allowed by law.

Therefore, notwithstanding that the amount of the Claimant's actual loss is greater than \$20,000.00, pursuant to Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03B(3)(a), I agree with the Fund's recommendation as to the amount of the award to the Claimant.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant suffered an actual loss of \$47,948.00 and is entitled to be compensated for the maximum amount allowed by law, \$20,000.00, as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 (2010); COMAR 09.08.03.03B(3)(c).

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;

ORDER that the Respondent be 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, 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

February 8, 2013
Date Decision Mailed


Latonya B. Dargan
Administrative Law Judge

LBD/kkc
#140200

**IN THE MATTER OF GLENDA
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 GUARANTY FUND
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 ALEXANDER HOMES, INC.
 RESPONDENT**

*** BEFORE LATONYA B. DARGAN,
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 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH Case No.: DLR-HIC-02-12-26966
 * MHIC Case No.: 10 (90) 1460
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FILE EXHIBIT LIST

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No exhibits were submitted for the Respondent.

PROPOSED ORDER

WHEREFORE, this 2nd day of April 2013, 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