

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL W. BURNS,
OF JAMES W. GRIERSON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-13-11689
FOR THE ALLEGED ACTS OR	* MHIC No.: 11 (90) 1144
OMISSIONS OF GREGORY	*
WENTWORTH, T/A TOTAL	*
MAKEOVER HOME	*
IMPROVEMENT,	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On April 25, 2012, James W. Grierson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,580.75<sup>1</sup> for actual losses allegedly suffered as a result of a home improvement contract with Gregory Wentworth, t/a Total Makeover Home Improvement (Respondent).

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<sup>1</sup> The Claimant seeks to amend this claim. This issue will be discussed herein.

I conducted a hearing at 9:30 AM on September 17, 2013, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. The Claimant appeared and was represented by Wayne S. Goddard, Esquire. Matthew A. Lawrence, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), appeared and represented the Fund. Neither the Respondent, nor anyone purporting to represent the Respondent, 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 procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.

### **ISSUES**

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

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

- Cl. Ex. 1      Contract, dated April 20, 2010, 1 page
- Cl. Ex. 2      Contract, dated April 20, 2010,<sup>2</sup> 1 page
- Cl. Ex. 3      Invoice, marked "PAID," dated April 20, 2010, 1 page
- Cl. Ex. 4      Letter from GK Wentworth Construction, LLC, dba Total Makeover Home Improvement, to Mr. and Mrs. Grierson, with attachment, 3 pages
- Cl. Ex. 5      Letter from Claimant to Respondent, dated March 8, 2011, with attachments, 27 pages
- Cl. Ex. 6      Photocopies of 14 photographs (A-N), taken March 10, 2011, 14 pages
- Cl. Ex. 7      Complaint Form, State of Maryland, DLLR, dated March 30, 2011, 1 page

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<sup>2</sup> This is a more legible copy of Cl. Ex. 1.

- Cl. Ex. 8 Letter from Wayne S. Goddard, Esquire, Cuomo & Goddard, LLP, to Respondent, dated July 22, 2011, 2 pages
- Cl. Ex. 9 Letter from Wayne S. Goddard, Esquire, Cuomo & Goddard, LLP, to Respondent, dated July 29, 2011, with attachments, 4 pages
- Cl. Ex. 10 Proposal, from Foundation Restoration Specialists, Inc., to Mr. and Mrs. James Grierson, dated November 14, 2011, with attachment, 4 pages
- Cl. Ex. 11 Order Form and Receipt, "Mr. Basement" Plus!, dated August 28, 2011, 2 pages
- Cl. Ex. 12 Photocopies of 10 Photographs (A-J), 10 pages
- Cl. Ex. 13 Summary of Damages, 1 page
- Cl. Ex. 14 DLLR Results for Active Licensed Home Improvement, dated September 16, 2013, 1 page
- Cl. Ex. 15 Letter from Foundation Restoration Specialists, Inc., to Wayne S. Goddard, 1 page
- Cl. Ex. 16 Letter/Proposal from Foundation Restoration Specialists, Inc., to Mr. and Mrs. James Grierson, 2 pages

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

- GF. Ex. 1 DLLR Licensing Information for the Respondent, License # 01 96349, printed September 16, 2013, 8 pages
- GF. Ex. 2 Home Improvement Claim Form, date received April 25, 2012, 1 page

Because the Respondent did not appear at this hearing, no exhibits were offered or admitted on his behalf.

### **Testimony**

The Claimant testified on his own behalf and offered the testimony of Adrian W. Palazzi, Foundation Restoration Specialists, Inc., who was accepted as an expert in evaluating and performing basement waterproofing projects.

The Fund did not present any witnesses.

The Respondent failed to appear and no witnesses appeared on his behalf.

## 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 registration number 01 96349. (GF Ex. 1.)
2. The Respondent's MHIC license expired on or about October 19, 2011. (GF Ex. 1.)
3. At some point in time on or before April 20, 2010, the Claimant decided to have home improvement work performed at his residential property located at 8107 Shore Road, Dundalk, Maryland 21222 (the Property).
4. The home improvement work was to consist of waterproofing of the Claimant's basement and related waterproofing work.
5. On April 20, 2010, the Claimant and the Respondent agreed to a Contract (Contract) for waterproofing work at the Property. (Cl. Exs. 1 and 2.)<sup>3</sup>
6. The total price of the Proposal was \$11,668.00. (Cl. Ex. 2 and 3.)
7. The work to be performed on the Property under the Contract consisted of:
  - 1) Install Hydro-Drain System
  - 2) 2 new sump pump systems with discharge
  - 3) Wall coating 658 sq. ft. 7" high
  - 4) Windows
  - 5) Sun Houses
  - 6) Spray foam
  - 7) Install 3" Trench Train System W/8" feed line
  - 8) Eliminate weatherwatch drain PVC Rebuild stairwell landing
  - 9) Under washer and sink 3' feed pipe

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<sup>3</sup> As noted in the list of Exhibits, Cl. Ex 1 and Cl. Ex. 2 are both copies of the Contract. Cl. Ex. 2 is a more legible copy of the document that the Claimant submitted into evidence subsequent to introduction of Cl. Ex 1. For purposes of this decision I shall, from this point forward, note Cl. Ex. 2 for purposes of designating the Contract.

10) Open up window jams

11) 4 Window wells

(Cl. Ex. 3.)

8. The Claimant paid the total Contract price of \$11,668.00 to the Respondent by way of three separate check payments:

- 1) a deposit of \$5,000.00 on April 20, 2010;
- 2) a payment of \$3,000.00 on May 2, 2010; and,
- 3) a final payment of \$3,668.00 on May 6, 2010.

(Cl. Ex. 2.)

9. The Respondent provided the Claimant with a signed warranty (Warranty) for the work performed. Cl. Exs. 4 and 5.
10. The Warranty provided that “if water from the floors or wall joint passes through the perimeter water control system and onto the basement floor we will provide the additional labor and materials to fix the leak at no additional charge to the homeowner. Said warranty will be in effect for the lifetime of the structure.” Cl. Ex. 4.
11. Work on the Project commenced on or after April 20, 2010, and was completed on May 6, 2010.
12. Over time, the Claimant began to have problems with work performed by the Respondent. Specifically, the Claimant began to experience the onset of water leakage and seepage from various points in the waterproofing work performed by the Respondent, including the installed window wells, as well as water appearing on the basement floor. Cl. Ex. 5.
13. The Claimant attempted to contact the Respondent regarding the problems with the waterproofing. Specifically, the Claimant made numerous telephone calls to the

- Respondent and left messages which were not returned and also wrote a letter to the Respondent dated March 8, 2011 outlining the problems. Cl. Ex. 5.
14. The Claimant took numerous photographs on March 10, 2011, which illustrated the conditions resulting from the waterproofing performed by the Respondent. Cl. Ex. 6.
  15. The photographs taken by the Claimant on March 10, 2011 illustrate significant water leakage and seepage throughout the basement area of the Property as well as areas of black mold resulting from the water leakage and seepage. Cl. Ex. 6.
  16. Water from the floors and/or wall joints passed through the perimeter water control system and onto the basement floor of the Property.
  17. The Respondent did not respond to the Claimant's numerous attempts to contact the Respondent regarding the issues caused by the installation of the waterproofing at the Property.
  18. The Respondent made no attempt to ever repair or remediate the issues caused by his installation of the waterproofing at the Property.
  19. The Respondent did not provide any additional labor and materials to fix leaks, deal with the consequences of leaks, or deal with any other consequences of his installation of waterproofing at the Property.
  20. On or about March 30, 2011, the Claimant filed a Complaint with the HIC regarding the waterproofing performed by the Respondent. Cl. Ex. 7.
  21. On July 27, 2011, Adrian W. Palazzi, Foundation Restoration Specialists, Inc. (Foundation), visited the Property and performed an evaluation of the waterproofing and related work performed by the Respondent.
  22. As a result of his examination of the waterproofing and related work performed by the Respondent, Mr. Pallazzi recommended the replacement of the system installed by the

Respondent, as well as other related remedial work, including the replacement of the window well drains installed by the Respondent. Mr. Pallazzi quoted a price of \$12,000.00 for this work. Cl. Exs. 9 and 15.

23. Mr. Pallazzi produced a letter regarding his evaluation of the waterproofing and his recommendations, which was forwarded to the Respondent by Wayne S. Goddard, Esquire, an attorney representing the Claimant, by way of a letter dated July 29, 2011. Cl. Ex. 9.
24. The Respondent failed to respond to the July 29, 2011 letter.
25. Foundation submitted a proposal (Foundation Proposal), dated August 26, 2011, for the repair and replacement of the waterproofing and related work performed by the Respondent at the Property in the amount of \$11,000.00. Cl. Ex. 16.
26. Foundation submitted a revised proposal (Revised Foundation Proposal), dated November 14, 2011,<sup>4</sup> for the repair and replacement of the waterproofing and related work done by the Respondent at the Property in the amount of \$10,580.75. Cl. Ex. 10.
27. The Claimant agreed to the Revised Foundation Proposal and work on the Property commenced in November 2011, and was completed on or about November 14, 2011.
28. The Claimant paid Foundation \$10,580.75 for the work performed.
29. The work required to repair and correct the inadequate and unworkmanlike work performed by the Respondent in the basement area included the following:
  - 1) Install a Pressure Relief System – approximately 96 Linear Feet
  - 2) Install New Window Wells – 3 – new window wells paid for and supplied by owner

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<sup>4</sup> Although the Foundation Proposal is dated November 14, 2011, the Claimant's check #1859 in the amount of \$3,600.00, payable to Foundation as a deposit, is dated November 2, 2011. The Revised Foundation Proposal carries the notation "**REVISED**" under the November 14, 2011 date and I conclude that the Revised Foundation Proposal admitted as Cl. Ex. 10 reflects the work as completed on November 14, 2011, under the Revised Foundation Proposal.

- 3) Install Window Well Drains – 3
- 4) Furnish and Install Waterproof Wall Panels – approximately 96 Linear Feet

Cl. Ex. 10.

30. On August 29, 2011, the Claimant purchased three basement window wells at a cost to the Claimant of \$900.00 from Mr. Basement LLC of Maryland. Cl. Ex. 11.
31. The three window wells purchased by the Claimant were not included in the \$10,580.75 paid to Foundation by the Claimant. The three window wells were installed by Foundation.
32. The Claimant has received no refund in any amount from the Respondent.
33. The Claimant's actual loss is \$11,480.75.

## **DISCUSSION**

### **Applicable Law**

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2013).<sup>5</sup> Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until the Fund is reimbursed. Md. Code Ann., Bus. Reg. § 8-411.

Homeowners who are victimized by the actions of licensed contractors may recover their “actual losses” from this pool of money, subject to a \$20,000.00 limitation on the claim of any one

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<sup>5</sup> Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.



aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2013).

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. 2013); *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).

The terms “unworkmanlike, inadequate, and incomplete” home improvement are not defined by relevant statute, regulation, or case law. Therefore, those words are given their “ordinary and common meaning within the context in which they are used.” *Chaney Enters. Ltd. P’ship v. Windsor*, 158 Md. App. 1, 25 (2004) (quoting *Polomski v. Mayor and City Council of Baltimore*, 344 Md. 70, 75 (1996)). “Workmanlike” is defined as “characterized by the skill and efficiency typical of a good workman.” *Merriam-Webster’s Collegiate Dictionary* 1443 (11<sup>th</sup> ed. 2006); *see also Webster’s II New Riverside University Dictionary* 1328 (1994) (“Typical of or befitting a skilled workman or craftsman.”). Therefore, unworkmanlike means not characterized by the skill and efficiency typical of a good workman.

“Inadequate” means “not adequate.” *Id.* at 627. “Adequate” means “sufficient for a specific requirement.” *Id.* at 15; *see also Webster’s New Riverside University Dictionary* 78 (1994) (“Able to satisfy a requirement.”). Therefore, inadequate means not sufficient for a particular purpose or not able to satisfy a requirement.

“Incomplete” means “not concluded” or “unfinished.” *Webster’s New World Dictionary* 711 (1986). “Complete” means “lacking no component part; full; whole; entire;” “brought to a conclusion; ended; finished.” *Id.* At 290. Therefore, incomplete means not having all the component parts, not brought to a conclusion or unfinished.

In addition, a remedial statute, like the one here, is “construed liberally in favor of the claimants.” *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215, 228 (2010).

The Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e); COMAR 09.08.03.03A(3). The burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2009). For the following reasons, I find that the Claimant has proven eligibility for compensation.

#### Notice to the Respondent

As noted in the Statement of the Case, the Respondent did not appear for the hearing on the scheduled hearing date. On April 22, 2013, the OAH mailed notice of a hearing (Notice) noting that a hearing was scheduled for September 17, 2013, at 9:30 AM at the OAH in Hunt Valley, Maryland, to the Respondent by certified and regular United States Postal Service (USPS) mail to the Respondent’s last home and trade address of record with the MHIC: 702 West McPhail Road, Bel Air, Maryland 21014. GF Ex. 1. The Notice advised the Respondent of the time, place and date of the hearing. The green certified mail return card was returned to the OAH by the USPS on April 25, 2013, and was signed and dated as received on April 24, 2013. There is no indication that the notice sent via first-class mail was returned by the USPS as undeliverable and it is, therefore, presumed to have been received.

The record reflects that the Fund met the notification requirements for the hearing when the notices were sent to the Respondent at his last address of record. Md. Code Ann., State Gov’t §§ 10-208, 10-209 (2010); Md. Code Ann., Bus Reg. § 8-312 (d), (h) (Supp. 2013); COMAR 09.01.02.07E. “If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.” Md. Code Ann., Bus. Reg. § 8-312(h) (Supp. 2013). When the Respondent failed to appear at

the hearing and no one appeared on his behalf<sup>6</sup> by approximately 9:50 AM, I proceeded in the Respondent's absence. COMAR 28.02.01.23. The Respondent did not appear at any point during the hearing.

### Analysis

The Fund presented conclusive evidence that the Respondent was, at all relevant times, a licensed home improvement contractor and there is no dispute that the Respondent held a valid contractor's license during all relevant times as well. There is also no dispute that the Claimant is an owner and that there is no procedural impediment barring him from recovering from the Fund (too many homes owned, a family relationship to the Respondent, etc.). Md. Code Ann., Bus. Reg. § 8-405(f) (Supp. 2013).

The Claimant has shown by a preponderance of the evidence that the Respondent failed to perform his obligations under the home improvement contract. The evidence is overwhelming that the Respondent performed unworkmanlike and inadequate home improvement work on the Claimant's residence in Dundalk, Maryland.

The Claimant testified that he sought waterproofing home improvement services for his home, which is his primary residence and is owned by him and his wife. He explained that he contracted with the Respondent to perform waterproofing and other related work at the property in April 2010. The Respondent performed the waterproofing work, which was completed on May 6, 2010. The Contract price of \$11,668.00 was paid by the Claimant to the Respondent in three payments: \$5,000.00 as a deposit on April 20, 2010; \$3,000.00 on May 2, 2010; and, a final

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<sup>6</sup> A green return of certified mail receipt card was received by the OAH on April 25, 2013, signed by a Jamie Mohler on behalf of William J. Holtzinger, Esquire. The file contains no reference to Mr. Holtzinger, no one present at the hearing, including counsel for the Fund and the Claimant, knew why Mr. Holtzinger had been notified of the hearing, and there was no other evidence as to why Mr. Holtzinger would have been sent the Notice by the OAH clerk. In any case, Mr. Holtzinger did not contact the OAH regarding the hearing, nor did appear for the hearing.

payment in the amount of \$3,668.00 on May 6, 2010. The Respondent also provided the Claimant with a warranty for the waterproofing work performed.

Over time, leaks and water seepage issues developed in the areas waterproofed by the Respondent, according to the Claimant. Utilizing various photographs taken in March, 2011, the Claimant illustrated clearly and specifically the leaks, water spots, pools of water and black mold (Issues) which developed within one year of the waterproofing performed in the basement area of his home. The Claimant said that he repeatedly attempted to contact the Respondent regarding these Issues, but that the Respondent did not respond and did not offer to perform any work to resolve the Issues – including performing any work under the warranty provided by the Respondent to the Claimant. Eventually, the Claimant had Adrian Palazzi of Foundation visit the property and provide an evaluation of the waterproofing system installed by the Respondent. Based on Mr. Palazzi's evaluation and recommendation, the Claimant eventually contracted with Foundation to replace and repair the waterproofing system installed by the Respondent for a price of \$10,580.75. The Claimant paid this amount to Foundation by way of two checks and the waterproofing work was done by Foundation in November 2011.

The Claimant also testified that he had been required to purchase three new window wells to replace three sub-standard window wells installed by the Respondent. He described the window wells installed by the Respondent as having been of different colors, cracked and defective. He paid \$900.00 for three replacement window wells (CL. Ex. 11), which were installed by Foundation, but stated that although installed by Foundation, the actual \$900.00 cost of the three window wells had not been a part of the contract with Foundation and was not a part of the Claimant's original claim with the HIC. The Claimant requested that he be permitted to amend the claim with the MHIC to include this additional \$900.00 for the purchase of the three replacement window wells.

The Claimant presented as a credible and persuasive witness. He spoke clearly without hesitation and his testimony flowed naturally. His testimony was brief and factual – he used various photographs to describe and illustrate the conditions resulting from the Respondent’s waterproofing work. The Claimant illustrated how the waterproofing was not functioning, showing: water seepage, leakage and pooling on walls and floors of his basement; bubbling paint on walls caused by water leakage; a poorly installed landing; and black mold resulting from water encroachment. His testimony as regards the results of the work performed by the Respondent was clear, direct and factual. His observations were supported by the photographs he employed to illustrate his testimony. The Claimant provided substantial, factual evidence of the results of the unworkmanlike and inadequate waterproofing work performed by the Respondent.

Mr. Palazzi also testified at the hearing. He has worked in the residential home improvement field since 1970, and he has had experience with waterproofing projects since 2001. He is the estimator for, and prepares all proposals for, Foundation, ninety percent of which are for residential projects. He estimates that he has been involved in 2500 projects. Based on his background and experience, Mr. Palazzi was accepted as an expert in performing and evaluating basement waterproofing projects.

Mr. Palazzi stated that he met with the Claimant regarding the waterproofing system installed by the Respondent and evaluated that system. He went to the Property and examined the waterproofing installed, including examining the basement. He prepared a narrative evaluation regarding his inspection. It was his conclusion that the system installed by the Respondent was “not functioning” and “not proper” and that the Respondent’s work was not workmanlike. Mr. Palazzi gave specific reasons for his conclusions regarding the unworkmanlike waterproofing work of the Respondent. He noted that leaving the old system in

place, as was done by the Respondent, was unworkmanlike, saying that he had “never seen an old system left in place” as was the case here. A drain installed by the washing machine in the basement was connected improperly to the drainage system with duct tape. Another drain installed by the stairs in the basement was also improperly connected to the drainage system. The window wells installed by the Respondent were not set to drain properly and required replacing.

Mr. Palazzi also said that his estimate of costs to replace and correct the waterproofing work done by the Respondent was “accurate and fairly priced” and that the work performed by Foundation was “absolutely necessary” to correct the unworkmanlike waterproofing performed by the Respondent.

Mr. Palazzi was a knowledgeable, clear and precise witness. His presentation was open and factual – his explanation for his conclusion that the Respondent’s waterproofing was unworkmanlike was supported by specific examples. I found no evidence that Mr. Palazzi was biased – his evaluation and conclusions were well-supported and were based on what he had personally observed, documented and recommended. His testimony was very credible and I found his entire presentation to be well-organized and quite persuasive. He was a knowledgeable, credible and persuasive witness for the Claimant.

In summary, the Claimant proved that he contracted with the Respondent to do home improvement waterproofing work at his home and that the work performed by the Respondent was inadequate and unworkmanlike. The Claimant proved that he paid the Respondent \$11,668.00 for the waterproofing performed. The Claimant also proved that the Respondent had failed to respond to repeated attempts by the Claimant to have the Respondent repair or remediate the ongoing water and mold issues caused by the Respondent’s faulty and inadequate work. The Claimant proved that the reasonable cost to repair and replace the inadequate and

unworkmanlike waterproofing and related work done by the Respondent, paid to Foundation, was \$10,580.75. The Claimant also proved that the cost of the three window wells that were paid for by the Claimant was \$900.00, and that these three window wells, installed by Foundation but not included in the amount paid to Foundation, were necessary to correct the faulty and incorrectly set window wells installed by the Respondent.

The costs of the repair and replacement of the work performed by the Respondent were, therefore, conclusively proven by the Claimant and clearly arose from the unworkmanlike and inadequate home improvement work performed by the Respondent.

The Respondent failed to appear for the hearing and therefore offered no evidence to place any of the Claimant's evidence in dispute. The Fund's representative acknowledged that the evidence clearly established the Claimant's entitlement to an award from the Fund under COMAR 09.08.03.03B(3). The Claimant has proved his eligibility for compensation.

#### Recommended Award

Having found eligibility 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). Because of the Respondent's "misconduct" described above, the Claimant has established an entitlement to reimbursement on his claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the following formulas for determining an "actual loss:"

(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 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 Respondent did perform work under the contract. Therefore, COMAR 09.08.03.03B(3)(a) is not applicable to this case. The Claimant is soliciting another contractor to complete the contract and, therefore, COMAR 09.08.03.03B(3)(b) is not applicable in this matter. The Fund recommends, and I concur, that the formula found at COMAR 09.08.03.03B(3)(c) offers the correct measurement in this case. COMAR 09.08.03.03B(3)(c) provides that if a contractor did work according to a contract and the claimant has solicited 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 to repair poor work done by the original contractor and complete the original contract, less the original contract price. That is the situation herein.

The Claimant provided clear evidence regarding his actual loss. The Claimant proved that he paid the Respondent \$11,668.00 by way of three checks written between April 20, 2010 and May 6, 2010. The Claimant proved that he paid Foundation \$10,580.75 to repair and replace the work done by the original contractor (the Respondent). I also find that the Claimant has proven that he paid \$900.00 to purchase three window wells which were installed by Foundation,



but paid for by the Claimant, to repair and replace work done by the original contractor. The \$900.00 paid by the Claimant for the three window wells is found to be proven for purposes of determining the Claimant's actual loss in this matter.

The Claimant seeks to amend his initial claim amount to reflect the \$900.00 amount proven to have been paid by the Claimant for the three window wells. COMAR 09.08.03.02C states:

C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

(1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or

(2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

The Claimant clearly did know about the facts involved in the \$900.00 purchase of the three window wells installed by Foundation before filing his claim with the MHIC and this is not, therefore, a basis for permitting him to amend his claim. As to prejudice to the Respondent, however, the Claimant proved that he made the purchase of the three window wells for \$900.00 and that the purchase was necessary to repair and replace the unworkmanlike and inadequate three window wells installed by the Respondent. These three window wells were purchased by the Claimant, but installed by Foundation and the evidence was clear that the replacement of the window wells was required<sup>7</sup> and was a result of the faulty and inadequate three window wells installed by the Respondent.

The Claimant apparently simply forgot to include this \$900.00 claim amount in his initial Claim with the MHIC (GF Ex. 2). This amount was clearly directly related to the inadequate and

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<sup>7</sup> "The window well drains which are in place are unlike anything I have ever seen. I strongly recommend having these replaced with industry standard window well drains." Cl. Ex. 9 (Mr. Palazzi's evaluation letter)

improper window wells installed by the Respondent. The replacement of the three window wells installed by the Respondent was a specific recommendation of Mr. Palazzi (Cl. Ex. 9) and were installed by Foundation as part of the repair and replacement process (Cl. Ex. 10). I find that the Respondent would not be prejudiced in any way by the Claimant amending the claim to reflect the \$900.00 payment which the Claimant made to purchase the three window wells required to replace the three inadequate and faulty window wells installed by the Respondent. I will permit the claim filed with the MHIC to be amended to add in the \$900.00 payment made by the Claimant for the three window wells to result in a revised total. The amount on line nine of the Home Improvement Claim Form should reflect this addition, for a revised amount of \$11,480.75 and the new claim amounts on lines ten and eleven should read \$11,480.75 as well.<sup>8</sup>

As a result of my findings, I will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(c). Using that formula, the computation is as follows:

Amount paid to the Respondent:	\$11,668.00
<i>Plus</i> amount payable to repair and replace:	<u>\$11,480.75<sup>9</sup></u>
<b>Total:</b>	<b>\$23,148.75</b>
<i>Minus</i> Contract price	<u>\$11,668.00</u>
<b>Actual Loss:</b>	<b>\$11,480.75</b>

The Claimant has demonstrated an "actual loss" of \$11,480.75. Md. Code Ann., Bus. Reg. § 8-401. 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. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2013). The Claimant paid \$11,668.00 to the Respondent, which is more than his actual loss of \$11,480.75. The Claimant is, therefore, entitled to reimbursement in the

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<sup>8</sup> At the hearing, the Fund's representative stated that he was proceeding with the presumption that the Fund would permit this amendment.

<sup>9</sup> Includes \$10,580.75 paid to Foundation plus \$900.00 paid by the Claimant to purchase the three window wells installed by Foundation.

full amount of his actual loss in this matter - \$11,480.75 - from the Fund. The Fund's representative also recommended that the actual loss of the Claimant be found to be \$11,480.75, and that the Claimant be reimbursed in that amount from the Fund.

Based upon my calculations and for the reasons outlined above, I recommend a finding of an actual loss in the amount of \$11,480.75 in this matter. I concur with the Fund's representative that the Claimant is entitled to compensation under the law in the amount of \$11,480.75 from the Fund.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained a compensable actual loss of \$11,480.75 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010); Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (2010 & Supp. 2013); COMAR 09.08.03.03B(3).

### **RECOMMENDED ORDER**

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the Maryland Home Improvement Commission:

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,480.75; 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 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

November 19, 2013  
Date Decision Mailed

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Michael W. Burns  
Administrative Law Judge



MWB/bp  
# 145472

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF JAMES W. GRIERSON,</b></p> <p><b>CLAIMANT,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF GREGORY</b></p> <p><b>WENTWORTH, T/A TOTAL</b></p> <p><b>MAKEOVER HOME</b></p> <p><b>IMPROVEMENT,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE MICHAEL W. BURNS,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH No.: DLR-HIC-02-13-11689</b></p> <p><b>* MHIC No.: 11 (90) 1144</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p>
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**FILE EXHIBIT LIST**

**Exhibits**

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

- Cl. Ex. 1      Contract, dated April 20, 2010, 1 page
- Cl. Ex. 2      Contract, dated April 20, 2010<sup>10</sup>
- Cl. Ex. 3      Invoice, marked “PAID,” dated April 20, 2010
- Cl. Ex. 4      Letter from GK Wentworth Construction, LLC, dba Total Makeover Home Improvement, to Mr. and Mrs. Grierson, with attachment, 3 pages
- Cl. Ex. 5      Letter from Claimant to Respondent, dated March 8, 2011, with attachments, 27 pages
- Cl. Ex. 6      Photocopies of 14 photographs (A-N), taken March 10, 2011, 14 pages
- Cl. Ex. 7      Compliant Form, State of Maryland, DLLR, dated March 30, 2011, 1 page

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<sup>10</sup> This is a more legible copy of Cl. Ex. 1.

- Cl. Ex. 8 Letter from Wayne S. Goddard, Cuomo & Goddard, LLP, to Respondent, dated July 22, 2011, 2 pages
- Cl. Ex. 9 Letter from Wayne S. Goddard, Cuomo & Goddard, LLP, to Respondent, dated July 29, 2011, with attachments, 4 pages
- Cl. Ex. 10 Proposal, from Foundation Restoration Specialists, Inc., to Mr. and Mrs. James Grierson, dated November 14, 2011, with attachment, 4 pages
- Cl. Ex. 11 Order Form and Receipt, "Mr. Basement" Plus!, dated August 28, 2011, 2 pages
- Cl. Ex. 12 Photocopies of 10 Photographs (A-J)
- Cl. Ex. 13 Summary of Damages, 1 page
- Cl. Ex. 14 DLLR Results for Active Licensed Home Improvement, dated September 16, 2013, 1 page
- Cl. Ex. 15 Letter from Foundation Restoration Specialists, Inc., to Wayne S. Goddard, 1 page
- Cl. Ex. 16 Letter/Proposal from Foundation Restoration Specialists, Inc., to Mr. and Mrs. James Grierson, 2 pages

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

- GF. Ex. 1 DLLR Licensing Information for the Respondent, License # 01 96349, printed September 16, 2013, 8 pages
- GF. Ex. 2 Home Improvement Claim Form, date received April 25, 2012

Because the Respondent did not appear at this hearing, no exhibits were offered or admitted on his behalf.

**PROPOSED ORDER**

***WHEREFORE, this 2nd of Januray 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.***

***Sachchia N. Gupta***

***Sachchia N. Gupta  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**