

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ARLETHIA MONROE,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF THURIEL GILMORE</p> <p>t/a GILMORE & SON, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE DEBORAH H. BUIE,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-14-02388</p> <p>* MHIC NO.: 13(90)378</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 1, 2013, Arlethia Monroe (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Thuriel Gilmore, t/a Gilmore & Son, Inc. (Respondent).

I held a hearing on June 6, 2014 at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010). Jessica Kaufman,

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent failed to appear after proper notice.¹

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department 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; 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

An Exhibit List is attached to this Proposed Decision.

Testimony

The Claimant testified in support of the Claim.

The Respondent presented no witnesses.

The Fund presented no witnesses.

FINDINGS OF FACT

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

¹ The OAH mailed a notice to the Respondent on March 3, 2014 at his address of record, by both certified and first class mail. The notice stated that failure to appear could lead to a decision against the Respondent. The certified mail envelope was returned to the OAH by the United States Postal Service (USPS) on or about April 1, 2014 with the notation "undeliverable as addressed, unable to forward." The copy of the notice sent by first class mail was not returned by the USPS, establishing a presumption of receipt. The Respondent did not request a postponement of the hearing. Accordingly, I concluded that the Respondent failed to appear after due notice of the hearing and that the case could properly proceed in his absence. See *Border v. Grooms*, 267 Md. 100, 104 (1972) (discussing the "mailbox rule.")

1. At all times relevant to the subject of this hearing, the Respondent was a home improvement contractor, licensed by the MHIC.
2. The Claimant owns a house located at 1006 Ellard Drive, Lanham, Maryland (the Property).
3. On or about December 26, 2009, the Claimant and the Respondent entered into a contract for construction of a deck and installation of a waterproofing system that consisted of a drain tile pipe with a sump pump (the Work)². The total contract price was \$21,000.00. The Claimant paid a deposit of \$2,500.00.
4. On January 13, 2010, the Claimant obtained a loan from EnerBankUSA in the amount of \$11,000.00 to be distributed in two loan advances. This lending institution was recommended by the Respondent's business office. The first loan advance of \$5,500.00 was paid to the Respondent.
5. The Respondent dug a ditch around the outside perimeter of the house and installed a sump pump in the laundry room. In March 2010, the sump pump stopped working and water was pouring down the basement walls. The Claimant called the Respondent and he called back without delay and after hearing of the problem, he recommended another sump pump be installed. Shortly thereafter, in April 2010, the Respondent installed another sump pump. This sump pump was installed directly in the crawl space, rather than in the laundry room.
6. On July 13, 2010, the Respondent requested, in writing, final payment of \$6,050.00 from the Claimant. The Claimant obtained funds from her credit union and paid the final payment.³
7. The Claimant paid the Respondent a total of \$21,000.00.

² The deck construction is not the subject of this claim. When referring to the Work, reference is made to the waterproofing system.

³ The Claimant established that she paid what the Respondent referenced as "final payment"; however, it was unclear when additional payments were made other than the deposit and the first advance.

8. After the third sump pump was installed in April 2010, the Claimant continued to experience water incursion in the crawl space. On May 6, 2010, the Claimant e-mailed the Respondent complaining of water once again coming in the wall next to the sump pump. The Respondent replied how much water and sent workers the same day. The workers merely walked around the rear of the Property and left.

9. The problem with water coming into the crawl space continued throughout 2010 and 2011 and in October 2011, the Claimant spoke with the Respondent and complained about the water and requested some relief. On October 11, 2011, the Respondent e-mailed the Claimant indicating "this is the first I heard of a water issue since the drain was put in."

10. The Claimant attempted, thereafter, to discuss the matter with the Respondent on the telephone; however, the Respondent hung up on the Claimant. No further negotiations between the parties took place.

11. Water continued to come into the crawl space and after a heavy rain in April 2012, the Claimant e-mailed the Respondent informing him that she had had the sump pump inspected and learned that it was not properly installed in the well.

12. On July 2, 2012, the Claimant entered into a contract with JES Water Proofing (JES). JES had inspected the pump and discovered that the sump pump was not connected to anything for discharge of the water. The sump pump was just sitting in the crawl space atop the ground.

13. JES installed a TripleSafe pump system with twin liner with a discharge line, a CleanSpace crawl space encapsulation system and an Everlast Crawl Space door. The cost of the Work was \$11,885.00 and the Claimant paid that amount in full on July 3, 2012.

14. The Work done by JES completely resolved the problem caused by the Respondent's inadequate home improvement work. The Claimant has experienced no water incursion into the crawl space since the completion of the work done by JES.

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. (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." Bus. Reg. § 8-401. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2010) provides that the Commission may not award from the Fund "more than \$20,000 to one claimant for the acts or omissions of one contractor." For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract. Second, there is no dispute that the waterproofing job was performed inadequately. The contract called for the installation of a drain pipe and sump pump to alleviate water incursion in the Claimant's crawlspace. The Respondent began the work in January of 2010 and completed it within a matter of weeks, but to the Claimant's dissatisfaction. The Claimant continued to have the very problem for which she hired the Respondent to resolve and she paid a hefty sum to him. It is undisputed that for over two years the Claimant reached out to the Respondent as water continued to pour into the crawlspace after rainstorms. Sometime around April 2012, the Respondent rejected the Claimant's calls and e-mails by not responding. No experts testified regarding the adequacy of work that was completed, but even absent such testimony the record clearly shows that the Work was unworkmanlike and inadequate because

the sump pump was discovered not to be connected to a discharge device. The Claimant was obligated to hire an additional contractor to perform the exact Work for which she paid the Respondent in full.

I found above that the Respondent was a licensed home improvement contractor for the purposes of reimbursement by the Fund. I now find that the Respondent's work was "unworkmanlike, inadequate, or incomplete." Md. Code Ann., Bus. Reg. § 8-401. I therefore conclude that the Claimant is entitled to recover compensation from the Fund for an actual loss resulting from acts or omissions by the Respondent. Md. Code Ann., Bus. Reg. §8-405(a) (Supp. 2013). In addition, the Fund argued that the Claimant should be entitled to an award to cover the costs of the monies paid to JES and I must agree.

The next issue is to determine the amount of the Claimant's actual loss. 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). The applicable regulation, however, provides in pertinent part as follows:

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).

Using the above formula, the Claimant's actual loss is \$11,885.00 and is calculated as follows:

\$ 21,000.00	Amount the Claimant paid the Respondent
<u>\$ 11,885.00</u>	Adding the amount to be paid to another contactor for repairs
\$ 32,885.00	Subtotal
<u>\$ 21,000.00</u>	Minus the original contract amount
\$ 11,885.00	The Claimant's actual loss

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss in the amount of \$11,885.00 as a result of the Respondent's acts and omissions Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013). The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$11,885.00.

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,885.00; and

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 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

August 26, 2014
Date Decision Issued

Deborah H. Buie *DHB/ALJ*
Administrative Law Judge

DHB/lh
151189

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ARLETHIA MONROE,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF THURIEL GILMORE</p> <p>t/a GILMORE & SONS, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE DEBORAH H. BUIE,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-14-02388</p> <p>* MHIC NO.: 13(90)378</p> <p>*</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

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

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| Cl. Ex. 1 | Contract, dated December 26, 2009 |
| Cl. Ex. 2 | Letter from EnerBank USA to Claimant, dated January 26, 2011 |
| Cl. Ex. 3 | Loan agreement for \$11,000.00, dated January 13, 2010 |
| Cl. Ex. 4 | Letter from Respondent to Claimant, dated July 23, 2010 |
| Cl. Ex. 5 | Photographs of crawlspace and laundry room (7) |
| Cl. Ex. 6 | Home Improvement Claim Form, dated April 27, 2013 |
| Cl. Ex. 7 | Invoice for \$11,885.00 paid to JES, dated July 3, 2012 |
| Cl. Ex. 8 | Complaint, dated October 1, 2012 |
| Cl. Ex. 9 | E-mails, 19 pages |
| CL. Ex. 10 | E-mail, dated April 24, 2012 |
| CL. Ex. 11 | E-mail requesting final payment, dated June 30, 2012 |

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

- Fund Ex. 1 Notice of hearing, dated March 3, 2013, December 30, 2013 Hearing Order attached
- Fund Ex. 2 Transmittal form
- Fund Ex. 3 MHIC licensing history for Respondent MHIC, dated April 28, 2014
- Fund Ex. 4 Verification of Respondent's address
- Fund Ex. 5 Letter from MHIC to Respondent, dated May 9, 2013

PROPOSED ORDER

WHEREFORE, this 26th of September 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION