IN THE MATTER OF THE CLAIM	*	**BEFORE JOY L. PHILLIPS,**
OF JULIE J. CHURCH,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF CHARLES J. QUINN,	*	
T/A QUINN WORKS QUALITY	*	**OAH No.: DLR-HIC-02-14-27229**
BUILDERS,	*	**MHIC No.: 13 (90) 88**
RESPONDENT	*	

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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 May 13, 2014, Julie J. Church (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $17,536.58 in alleged actual losses suffered as a result of a home improvement contract with Charles J. Quinn, trading as Quinn Works Quality Builders (Respondent).

I held a hearing on August 24, 2015[1] at the Caroline County library in Denton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).[2] The Claimant represented herself. Daniel D. Rosendale, Esquire, represented the Respondent, who was present. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), 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 (some numbered exhibits were not admitted[3]):

Clmt. Ex. 1 - Contract, dated June 16, 2011
Clmt. Ex. 2 - Letter from the Respondent to the Claimant, dated May 8, 2012
Clmt. Ex. 3 - Photos a. – d.
Clmt. Ex. 4 - Letter from the Respondent, dated June 11, 2012
Clmt. Ex. 5 - Photos a. – d.
Clmt. Ex. 6 - Complaint Form, dated July 16, 2012, with attached letter
Clmt. Ex. 8 - Photos a. – h.

[1]The matter was initially scheduled for hearing on May 19, 2015. It was postponed at the request of the Respondent.
[2] Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Volume.
[3] COMAR 28.01.02.22C provides, "All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall be retained for purposes of judicial review."

Clmt. Ex. 9 - Mid Shore Community Mediation Center Memorandum of Agreement, dated December 7, 2012 and November 9, 2012
Clmt. Ex. 10 - Letter from the Claimant to the MHIC, dated February 23, 2014
Clmt. Ex. 11 - Home Improvement Claim Form, dated May 13, 2014, with pages 1-4 (page 5 not admitted)
Clmt. Ex. 13 - Photo
Clmt. Ex. 15 – Photos a. – c.
Clmt. Ex. 16 - Finish Nail
Clmt. Ex. 19 - Screw
Clmt. Ex. 20 - Photographs (C, K and M only)
Clmt. Ex. 21 - Photo

I admitted the following exhibits on the Respondent's behalf (exhibit 2 was not offered into evidence):

Resp. Ex. 1 - E-mail from the Respondent to the Claimant, dated November 9, 2012
Resp. Ex. 3 - Permit application, Building plans, Permit and two Requests for Inspections
Resp. Ex. 4 - E-mail from Marie Isenhour to the Respondent, dated October 5, 2012
Resp. Ex. 5 - E-mail from Andrew Worm to the Respondent, dated April 30, 2015

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notices of Hearing, dated April 2, 2015 and May 29, 2015
Fund Ex. 2 - Hearing Order, dated July 25, 2014
Fund Ex. 3 - Licensing Information for the Respondent, printed August 18, 2015
Fund Ex. 4 - Home Improvement Claim Form, dated May 13, 2014
Fund Ex. 5 - Letter from the MHIC to the Respondent, dated June 12, 2014
Fund Ex. 6 - Licensing Information for Quality Builders, Inc., printed August 20, 2015

Testimony

The Claimant testified and presented the testimony of Mary Ressler, Owner and President of Quality Builders, who was recognized as an expert in the area of construction.

The Respondent testified and presented the testimony of Hal Davis, a building inspector with Middle Department Inspection Agency.

The Fund presented no 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 01-30344.

2. On August 24, 2011, the Claimant and the Respondent entered into a contract to build a deck, in two adjoining sections, on the rear of the Claimant's home.

3. The agreed-upon contract price was $23,250.00. The deck was completed in September 2011. Final payment was made on September 7, 2011.

4. The Claimant chose a Fiberon composite product for the deck boards.

5. The deck boards may be installed using finish nails, screws or hidden fasteners. There is a price difference between each of these fastening items, with finish nails being the least expensive. The Claimant agreed to permit the Respondent to use finish nails to install the boards.

6. The Respondent installed the deck boards using three finish nails per row rather than two, and leaving the recommended 3/6" gap between boards. To achieve that gap, the Respondent used spacers as he laid the boards.

7. Permits were pulled for the deck. It passed inspection on August 4, 2011 (footers) and August 25, 2011 (deck).

8. The extreme heat of the summer and fall of 2011 caused some of the Fiberon boards to swell, according to the manufacturer. Some of the boards also "mushroomed" up around the nails used to fasten the boards down.

9. In April and May 2012, the Claimant noticed that some of the boards on her deck had swollen, with the result that rainwater was pooling up, boards were mushrooming around nails, and nails were popping up.

10. The Claimant notified the Respondent of the problem and the Respondent went out to the Claimant's home on May 8, 2012 and June 11, 2012 to review the damage and pound the nails down. The Respondent also made some cuts between the boards to allow rainwater to drain off the deck.

11. The Claimant was dissatisfied with the repairs and filed a complaint with the MHIC on July 25, 2012.

12. From September 6, 2012 to November 9, 2012, the Claimant and the Respondent engaged in mediation at the Mid Shore Community Mediation Center. The parties reached an agreement, which provided that the Respondent would supply replacement boards for the deck and the Claimant would remove the old boards, dispose of the old boards, and install the new boards. The agreement called for the Respondent to pay for the boards and to provide the name of a contact person at the Respondent's building supply store when the boards were ordered.

13. Because the manufacturer found that the composite boards were at fault, Fiberon agreed to give the Respondent a 20% reduction in price on the replacement decking.

14. At the mediation, the Claimant told the Respondent that she planned on doing the work[4] in January 2013.

15. The Respondent ordered the replacement decking from his supplier, Allied Building Supply (Allied), on November 9, 2012 at a cost of $3,414.58. The Respondent does so much business with Allied that the store does not require him to pay for his orders up front, but allows him to pay on delivery or pick up.

16. The Respondent provided the Claimant with the name of the store and the contact person.

[4] It was suggested that the Claimant was going to hire someone to help install the replacement boards, but I have referred to the Claimant doing it because the Respondent was not responsible for any labor involved in repairing the deck.

17. The Claimant signed the mediation agreement on December 7, 2012.

18. Allied gathered the boards as ordered by the Respondent and put them aside for the Claimant to make sure the correct color was not changed or discontinued before the Claimant picked them up.

19. The Claimant called Allied in December 2012 or January 2013 and confirmed that the replacement boards had been ordered.

20. Sometime in December 2013, thirteen months after the mediation agreement had been signed by the Respondent, the Claimant's husband went to Allied to pick up the boards. A different employee than the one the Respondent placed the order with told the Claimant's husband that the boards had not been paid for.

21. The Claimant called the Respondent to complain that the boards were not at Allied and the Respondent called Allied. The employee, Andrew, told the Respondent that the boards could not be held in their small yard for so many months and once the Claimant did not pick them up, the boards had been sold to other buyers, at a discount, because they needed to get them out of the yard.

22. The mediation agreement called for the parties to use the Mediation Center over any dispute regarding the agreement.

23. The Respondent called the Mediation Center regarding the Claimant's complaint and offered to reimburse the Claimant for the boards she would need to buy. The Mediation Center extended that offer to the Claimant, who rejected it.

24. On May 13, 2014, the Claimant filed a claim with the MHIC, requesting reimbursement of $17,536.58 from the Fund.[5]

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." 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.

Section 8-405 of the Business Regulation Article of the Maryland Code Annotated provides:

> (d) Denial of claim. -- The Commission may deny a claim if the Commission finds that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.

For the following reasons, I find that the Claimant has not proven eligibility for compensation.

There is no question that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

Pursuant to the contract, the Respondent constructed a deck in two adjoining sections on the Claimant's home. He discussed the materials with the Claimant and together, they chose the composite boards and the nails that would be used to construct the deck.

[5] It was never made clear how the Claimant derived this figure. She presented an estimate for replacing the deck, which included labor, for $10,622.00. (Clmt. Ex. 11, p. 3.) Another estimate, for removing and replacing a gazebo, was not admitted into evidence because the gazebo was never a part of the original contract or the mediated agreement.

Once the deck was constructed, it became apparent that the composite boards chosen for the decking were faulty. By April and May 2012, some of the boards had swollen to the point that there was no space between them to permit rain water to flow off of the deck. Some of the finish nails popped up, and around some of the nails, the boards mushroomed. The manufacturer surmised that the swelling that occurred in the decking was caused by the extreme heat of 2011. The Respondent testified that the Fiberon manufacturer conceded that other builders had had the same problem with the composite decking that year. Because the manufacturer accepted some responsibility, it later agreed to discount the replacement boards the Respondent ordered for the Claimant.

Throughout her presentation, the Claimant focused on the nails that the Respondent used for the deck, criticizing that choice and arguing that screws or fasteners were required. The Respondent testified, without rebuttal, that the Claimant chose the nails after being presented with pricier alternatives. He said he had used finish nails previously in the same type of deck without problems and that Fiberon, the manufacturer of the composite boards used by the Respondent to build the Claimant's deck, approves the use of finish nails to nail down the boards. He said that he used three nails where only two were called for. Given the lack of reliable evidence rebutting the Respondent's assertions, I do not conclude that the Respondent's use of finish nails on the Claimant's deck constitutes unworkmanlike or inadequate home improvement.

Having reviewed all of the Claimant's and the Respondent's testimony and evidence, I was struck by the good faith efforts made by the Respondent to correct the decking problems. In the spring of 2012, long after the deck passed inspection in August 2011, the Claimant notified the Respondent about the nails popping out and swollen, buckling boards. The Respondent went to the home and repaired the deck by hammering down the nails. He also sawed in between

some boards to relieve the tightness that developed when some of the boards swelled up. He acknowledged in his testimony that his attempts to repair the swollen boards left unsightly cuts in the deck and he was not satisfied with its appearance. Nevertheless, when Hal Davis inspected the deck, in preparation for the hearing, he found that the deck was sound and met code, although he agreed that the cuts were unsightly. Given that the deck met code and was sound, I find that even the Respondent's attempt to rectify that faulty boards did not constitute unworkmanlike or inadequate home improvement.

After the Claimant filed a complaint against the Respondent with the MHIC, the parties agreed to go to mediation to resolve the dispute over the unsightly repairs. They met three times between September and November 2012 and were able to enter into an agreement. The Respondent signed the agreement on November 9, 2012. He agreed to provide replacement boards for the deck. The Claimant agreed to remove the old decking and install new boards. She did not sign the agreement until December 7, 2012. Nevertheless, the Respondent placed the order for the replacement boards with his building supply store, Allied, on November 9, 2012. The staff at Allied gathered the boards together and agreed to store them for pick up to ensure the color was not discontinued or the boards sold to others.

There was a difference in testimony regarding the timing of picking up the boards from Allied. The Claimant testified that she had told the Respondent they were planning on installing the replacement boards in the summer of 2013. The Respondent recalled that at the mediation, the Claimant said that she was intending to do the work in January 2013. Thus, when the Respondent ordered the replacement boards, he obtained Allied's agreement to store the boards through January 2013. The e-mail he sent to the Claimant on November 9, 2012 (Resp. Ex. 1) corroborates this testimony, as he wrote to her that the boards had been ordered and "they will hold it till you call for delivery in early [J]anuary." The Claimant never corrected this date and,

in fact, called Allied to make sure the boards had been ordered. This leads me to conclude that the Respondent's recollection that the Claimant said during mediation that she was going to do the work in January 2013 is correct.

There is no indication that after the first phone call to assure the boards had been ordered the Claimant ever called Allied again to discuss continued storage of the boards. In December 2013, thirteen months from when the Respondent ordered the boards, the Claimant's husband went to Allied to retrieve them. The Claimant testified that they did not retrieve the boards earlier because in May 2013, her in-laws were in a tragic car accident that led to her father-in-law's death and serious brain injuries to her mother-in-law. Their lives were completely absorbed in caring for their children and their in-laws from May to December 2013. Clearly, this was a difficult time for the entire family.

When the Claimant's husband went to Allied in December 2013 to retrieve the boards, he talked to someone other than the person who took the order on November 9, 2012. According to the Claimant, the new employee, Andrew, told him that the boards had never been paid for and thus, they could not release the boards to them. When questioned by the Respondent after receiving a call from the Claimant, Andrew told the Respondent that the boards had been sold during the year, at a discount, because their storage yard was too small to store them for so long. Given the Respondent's business standing with Allied and his practice of paying for pre-ordered materials upon pick-up rather than at the time of placing the order, this latter explanation makes the most sense and is, I find, more believable than the Claimant's account of what Andrew said.

It is unreasonable to expect a building supplier to store large amounts of supplies for thirteen months without even a call to explain why there is such a delay in pick up. I find it reasonable for the store to bill the Respondent when the materials are picked up, based on his longstanding business relationship with them. Even though the mediation agreement failed to

include a deadline for the Claimant to pick up the materials, given that she told the Respondent during mediation that she intended to do the work in January 2013, it is reasonable for the Respondent to assume the materials would be picked up by January; there is no reason for him to have made arrangements with Allied to store the boards indefinitely.

Without question, what the Claimant and her family experienced from May to December 2013 was tragic and all-encompassing. But the Claimant never explained why she did not retrieve the boards prior to the car accident in May 2013. I do not find it reasonable to enter into an agreement in November, confirm that the other party has complied with the agreement, and then fail to perform your own part of the agreement until thirteen months later—or even within the five to six months prior to the car accident.

There were other weaknesses in the Claimant's case that cause me to credit the Respondent's version of events over the Claimant's. For example, the Claimant never itemized the amount she was seeking from the Fund and I could not understand it based on the evidence presented. The Claimant presented the testimony of a contractor, Mary Ressler, who gave her an estimate to replace the deck at a cost of $10,622.00. (Clmt Ex. 11, p. 3.) The estimate was not itemized and Ms. Ressler could not break down that total or identify what part of that total was for labor. Further, Ms. Ressler, who maintains an office in Delaware, was surprised to learn during the hearing that her Maryland MHIC license was not current.

I was also concerned that although the mediation agreement called for the parties to return to the Mediation Center in the event of a dispute about the agreement, when the Respondent offered, through the Mediation Center, to pay money directly to the Claimant to resolve the matter, the Claimant refused.

In response to the evidence submitted by the Claimant and the Respondent, the Fund argued that the Respondent did make good faith efforts to resolve the Claimant's complaints, but

that the Claimant's rejection of those efforts was not unreasonable. The Fund noted that the car accident explained some, but not all, of the delay in picking up the replacement boards from Allied and that the delay from November 2012 to May 2013, when the accident occurred, was not an unreasonable delay. The Fund argued, however, that the Claimant failed to produce evidence in support of her claim for $17,536.58. It argued that Ms. Ressler was not credible because her testimony was often inconsistent and unclear and she did not itemize her estimate. The Fund noted that two inspectors had approved the deck as meeting code, referring to the inspector in 2011 and Hal Davis, who inspected the deck on April 22, 2015, in preparation for hearing, and found that it met code. Ultimately, the Fund said, the problem stemmed more from a product failure than an unworkmanlike job by the Respondent. In the alternative, the Fund said that if I disagree with its analysis rejecting the Claimant's request for reimbursement from the Fund, the most the Claimant would be entitled to receive would be $4,020.24, representing the Respondent's estimate at the time of the hearing of the replacement boards needed to repair the deck.

I agree with the Fund that the Claimant failed to prove that she is entitled to reimbursement from the Fund, although my analysis differs. The evidence shows that the materials used to build the Claimant's deck were faulty, and the work conducted by the Respondent was not unworkmanlike. Once there was damage done to the decking, the repair work the Respondent did to the deck was unsightly, as he concedes, but it met code. In response to the Claimant's dissatisfaction with the appearance of the deck, the Respondent and the Claimant came to a mediated agreement in which the Respondent agreed to pay for replacement boards. Based on conversations they had during the mediation sessions, he understood that the Claimant wanted to retrieve the replacement boards from Allied in January 2013. He had an agreement with Allied to pay for his pre-ordered materials upon pick up. The Claimant did not

attempt to pick up the materials until December 2013, thirteen months after the materials were ordered. Despite this delay, the Respondent again offered to pay the Claimant to replace the boards, an offer rejected by the Claimant.

The Claimant has failed to show that she experienced an actual loss due to the Respondent's misconduct. Even if I were to find that the Respondent performed in an unworkmanlike manner on the Claimant's deck, due to the unsightly repairs made to correct the problems caused by the faulty boards, the evidence shows that the Respondent made several good faith attempts to resolve the Claimant's dissatisfaction with her deck and that she unreasonably rejected those attempts. Accordingly, I conclude that the Claimant failed to prove that she is entitled to compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

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

November 9, 2015
Date Decision Issued

Signature on File
Joy L. Phillips
Administrative Law Judge

JLP/da
#159022

PROPOSED ORDER

WHEREFORE, this 1st day of February, 2016, 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