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OFFICE OF THE ATTORNEY GENERAL

DANIEL G. STEEN, JR.  
t/a CHESAPEAKE HOME REMODELING  
& DESIGN, LLC

Petitioner

v.

MARYLAND HOME IMPROVEMENT  
COMMISSION

Respondent

and

SHIRLEY J. YOUNG

Respondent

\* \* \* \* \*

ORDER

Upon motion by the Respondent, Maryland Home Improvement Commission, to dismiss the above appeal, and as it appears that the Petitioner has failed, without good cause, to provide a transcript of the administrative hearing, as required by Maryland Rule 7-206,

it is this 20<sup>th</sup> day of January, 2015, by this Court hereby

ORDERED, that the above appeal is DISMISSED with prejudice.

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Signature on File

\_\_\_\_\_  
JUDGE

Notary Public  
Notary State of Maryland  
Notary Public  
[Circular Notary Seal]

IN THE MATTER OF THE CLAIM \* MARYLAND HOME  
OF SHIRLEY J. YOUNG \* IMPROVEMENT COMMISSION  
AGAINST THE MARYLAND HOME \*  
IMPROVEMENT GUARANTY FUND \*  
FOR ALLEGED VIOLATIONS OF \* MHIC CASE NO. 14 (75) 457  
DANIEL G. STEEN, t/a CHESAPEAKE \*  
HOME REMODELING & DESIGN, LLC \*

FINAL ORDER

WHEREFORE, this 27<sup>th</sup> day of July, 2015, Panel B of the Maryland

Home Improvement Commission ORDERS that:

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:
  - A) The Commission concludes, as a matter of law, that a contractor's noncompliance with the notice requirements of COMAR 09.08.01.25 does not generally render a mandatory arbitration clause unenforceable.
  - B) However, the Commission affirms the conclusion of the Administrative Law Judge that, in this case, there was not, within the meaning of Business Regulation Article, §8-405(c), an agreement which mandated arbitration of the dispute between the Claimant and the Respondent.
  - C) As stated by the Administrative Law Judge, under Maryland law, in construing the language of a contract, ambiguities are resolved against the party which drafted the contract, who in this case is the Respondent. As the Administrative Law Judge found, the contract language drafted by the Respondent is, at best, ambiguous with respect to the issue of whether the specific dispute between the Claimant and Respondent even falls within the

**scope of the arbitration clause. Therefore, the Administrative Law Judge correctly resolved the ambiguity against the Respondent, and correctly found that the Claimant's Guaranty Fund claim was not stayed under Business Regulation Article, §8-405(c).**

**3) The Recommended Order of the Administrative Law Judge to award the Claimant \$2,640.00 from the Home Improvement Guaranty Fund is Affirmed.**

~~**4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**~~

***Joseph Tunney*** \_\_\_\_\_

**Chair - Panel B**

**MARYLAND HOME IMPROVEMENT  
COMMISSION**

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
SHIRLEY J. YOUNG	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMINISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	
HOME IMPROVEMENT WORK	*	
UNDERTAKEN BY	*	
DANIEL G. STEEN, T/A CHESAPEAKE	*	OAH NO.: DLR-HIC-02-14-22325
HOME REMODELING & DESIGN, LLC	*	MHIC NO.: 14 (75) 457

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

This case arose because of a complaint filed by Shirley J. Young (Claimant) with the Maryland Home Improvement Commission (MHIC) against Daniel G. Steen, t/a Chesapeake Home Remodeling & Design, LLC (Respondent). The Claimant asserts in her complaint that she entered into a contract with the Respondent for the performance of home improvement work at her residence; the Respondent was paid a deposit for the work, but did no work.

On March 20, 2014, the Claimant filed a claim with the MHIC seeking to recover \$2,640.00 from the Home Improvement Guaranty Fund (Fund). On June 11, 2014, the MHIC issued an order for a hearing on the claim against the Fund.

On December 8, 2014, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010 & Supp. 2014). The hearing was conducted at the Administrative Law Building located in Hunt Valley, Maryland.

The Claimant appeared and represented herself. Noel Hazelwood, Vice President, Chesapeake Home Remodeling & Design, LLC, represented the Respondent.<sup>1</sup> Jessica Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing and Regulation, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01, COMAR 09.08.03.03; COMAR 28.02.01.

### ISSUES

The issues are:

(1) Whether the claim against the Fund should be dismissed or stayed because the Claimant did not submit her complaint to arbitration in accordance with an arbitration clause in the home improvement contract; and if not,

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<sup>1</sup> Daniel G. Steen was present and was advised, as he was listed as the individual contractor of record with the MHIC, he would be "jointly and severally responsible" with the LLC for any proven "actual loss" under the Maryland Home Improvement Law. COMAR 09.08.01.04C. Regardless, Mr. Steen elected to take no part in the hearing other than to sign a Special Power of Attorney authorizing Mr. Hazelwood to represent the LLC.

(2) Whether the Claimant sustained an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland, and if so, the amount of the award.

### **SUMMARY OF THE EVIDENCE**

#### **A. Exhibits**

The following items were admitted into the record:

Fund Exhibit #1 – October 6, 2014 Notice of Hearing sent to the parties (two pages)

Fund Exhibit #2 – ~~Transmittal from the MHIC, a June 11, 2014 Hearing Order, and a March 20, 2014 Home Improvement Claim Form (four pages)~~

Fund Exhibit #3 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent with October 23, 2013 MHIC certification (seven pages)

Fund Exhibit #4 – March 20, 2014 letter from Joseph Tunney, Acting Chairman, MHIC, with a copy of the March 20, 2014 Home Improvement Claim Form (two pages)

Fund Exhibit #5 – Copy of an October 30, 2013 MHIC Complaint Form (one page)

Claimant Exhibit #1 – Copy of an April 18, 2012 check in the amount of \$2,640.00 negotiated on April 23, 2014 (one page)

Claimant Exhibit #2 – Copy of a Complaint Form filed with the Howard County Office of Consumer Affairs, dated July 15, 2013, with an attachment (three pages)

Respondent Exhibit #1 – Contract, dated April 18, 2012 (one page)

Respondent Exhibit #2 – Addendum to Contract, dated April 18, 2012 (one page)

No other exhibits were offered into evidence.

#### **B. Testimony**

The Claimant testified in support of the claim against the Fund. The Respondent’s representative testified in opposition to the claim against the Fund. No other witnesses were called to testify.

## PROPOSED FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license numbers 01-99336 (as an individual) & 05-126955 (LLC).
2. At all times relevant, the Claimant owned and lived at the residence located at 10045 Guilford Road, Jessup, Maryland 20794 (the property).
3. The Claimant was contacted by a telemarketer who was soliciting home improvement work and who offered to arrange for a sales representative of the Respondent to meet with the Claimant and discuss the building of a deck at the property.
4. On April 18, 2012, Jaron Rice, a MHIC-licensed salesperson employed by the Respondent to sell the construction of decks as home improvements to prospective customers, met with the Claimant at the property. Mr. Rice and the Claimant discussed the building of a deck at the property.
5. During this discussion, the Claimant told Mr. Rice that she could not afford to pay for a new deck unless she was able to finance the cost. Mr. Rice assured the Claimant that the Respondent would see to it that she would be able to obtain financing to pay for the new deck.
6. On April 18, 2012, the Claimant entered into a written home improvement contract with the Respondent to build a deck at the property (the Contract). The Claimant and Mr. Rice signed a one-page, self-carbonizing form reflecting the terms of the contract. The signatures to the Contract appear on the front side of the self-carbonizing form. The reverse side of the form contains the "General Terms and Conditions of Contract." (Respondent Exhibit #1) The Addendum to the

Contract, also signed by the Claimant, contained a brief description of the materials and dimensions of the deck, a warranty for five years on parts and labor, and included a sketch of the deck in relation to the house on the property. Mr. Rice left a homeowner's copy of the Contract and the Addendum with the Claimant.

7. At the bottom of the first page, under the signatures of the Claimant and Mr. Rice, the Contract reads (Respondent Exhibit #1):

Owner may cancel this transaction any time prior to midnight of the third business day after the date of the execution of this Contract. To cancel this Contract, Owner must e-mail, or deliver via first-class mail to the above address, a signed and dated written notice of intention to cancel the work hereunder not later than midnight of [April 21, 2012].

8. The total contract price for the home improvement work under the Contract was \$8,640.00 with a specified deposit of \$2,640.00. The contract also read that it was "not contingent or conditional upon financing." (Respondent Exhibit #1, front side, para. 3)

9. On April 18, 2012, the Claimant gave a check to Mr. Rice made payable to the Respondent in the amount of \$2,640.00. On or about April 23, 2012, the Respondent negotiated and cashed that check.

10. The Contract listed the approximate start date of the work as May 15, 2012 and the approximate completion date as May 31, 2012. The contract specified that "[a]ll starting and completion dates are approximate and subject to delays caused by circumstances and conditions beyond [the Respondent's] control, including but not limited to strike, material shortages, fire, flood and other acts of God, or by delays caused by Owner." (Respondent Exhibit #1, front side, para. 8)

11. At no time did the Respondent perform any home improvement work at the property. The Respondent made no deliveries of materials to the property. The Respondent did not obtain a



building permit for building a deck at the property. After April 18, 2012, no workers, agents, or sales representatives of the Respondent came to the property.

12. Between the end of May 2012 and July 15, 2013, the Claimant made over five telephone calls to telephone numbers she had been given by Mr. Rice (or that she had obtained on her own) and spoke with individuals who identified themselves as agents or employees of the Respondent asking when the home improvement work at the property would commence. The individuals that the Claimant spoke with made excuses about the delay; however, after each of her calls, the Claimant was not re-contacted by anyone representing the Respondent. Among other excuses, the Claimant was told that the Respondent's workers were occupied with other home improvement projects.

13. Before July 15, 2013, the Claimant did not contact any of the Respondent's workers, agents, or sales representatives and indicate any verbal intention to cancel the Contract. At no time did the Claimant provide any written notice to the Respondent that it was her intention to cancel the Contract. The Claimant did not engage an attorney to act in her behalf in any of her dealings with the Respondent.

14. On July 15, 2013, the Claimant filed a complaint regarding the Respondent with the Howard County Office of Consumer Affairs indicating that she had paid \$2,640.00 to the Respondent and that she had "called and they said they were behind and I would have to wait so I did." (Claimant Exhibit #2) After she filed that complaint, the Claimant no longer wanted the Respondent to perform the home improvement work at the property as financing had not been arranged for the balance that would be owed for the completion of the work and she could not otherwise pay the balance.

15. On or about October 30, 2013, the Howard County Office of Consumer Affairs forwarded a copy of the complaint to the MHIC.

16. After the complaint was filed, the Respondent did not return to the Claimant any of the \$2,640.00 that was paid.

17. On March 20, 2014, the Claimant filed a claim against the Fund.

### **DISCUSSION**

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 through 8-411 (2010 & Supp. 2014).<sup>2</sup> Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. 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 aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2014). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a)(Supp. 2014). 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 (Supp. 2014). The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

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<sup>2</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.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “The Fund may only compensate for actual losses claimant incurred as a result of misconduct by a licensed contractor.” COMAR 09.08.03.03B(2). “At a hearing on a claim, the claimant has the burden of proof.” Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2014).

#### MOTION TO DISMISS

Before the hearing, the Respondent filed a Motion to Dismiss Hearing and Complaint (the Motion). At the outset of the hearing, the parties were provided an opportunity for oral argument on the Motion; and, the ALJ reserved ruling on the Motion and advised the parties that a ruling would be included in this Proposed Decision. In pertinent part, the Motion reads:

1. [The Claimant] entered into a valid Home Improvement Contract to build a deck on April 18, 2012.
2. The [C]ontract clearly states[:]

Owner may cancel this transaction any time prior to midnight of the third business day after the date of the execution of this contract. To cancel this contract, Owner must e-mail, or deliver via first-class mail to the above address, a signed and dated written notice to cancel the work hereunder not later than midnight of [April 21, 2012].

3. Owner subsequently had her son telephone and cancel well beyond [April 21, 2012].
4. #8 of General Terms and Conditions of [the] Contract . . . states[:]

In the event Owner fails to comply with any provision of this Contract, then owner shall pay Contractor, upon demand, a sum in cash equal to all direct and indirect costs incurred by Contractor, plus an amount equal to twenty-five (25%) of the Contract price as liquidated damages. Court Costs and reasonable attorney’s fees shall be considered direct costs.

5. Contractor retained [Claimant's] cash deposit of \$2,640.00 which represents (25%) liquidated damaged of \$2,160.00 for the \$8,640.00 contract and \$480.00 in indirect costs for administrative costs associated with preparation for construction.
6. [Claimant] demanded entire deposit back and has filed this complaint as a result of contractor refusal to return deposit.
7. #11 of General Terms and Conditions of [the] Contract . . . states[:]

In the event of a dispute arising between the parties relating to work, or workmanship to be performed, or payments due under and owing under this Contract, then Owner agrees that the dispute shall either be arbitrated, or litigated in the District Court of Maryland for Harford County or the Circuit Court for Harford County. It is within Contractor's discretion whether to pursue arbitration or to file suit. ~~Prior to filing suit however, Contractor will notify Owner whether Contractor will arbitrate or file suit by send notice to Owner's address herein.~~ If arbitration is selected then costs of such arbitration (excluding evidentiary costs) shall be divided equally between the parties. Owner understands that the arbitrator may require a reasonable amount as an advance payment. Owner's failure to post the arbitrator's requested advanced payment shall result in an adverse finding to Owner. Owner understands that the arbitration award may be entered as a judgment in any Court in the State of Maryland or the United States.

8. [Respondent] sent [Claimant] a letter after her son cancelled out of rescission informing her that she was free to initiate arbitration if she . . . disputed the terms of the [C]ontract. To date she has not.

The Respondent points out that the Claimant has not sought arbitration as provided for under terms of the Contract and argues that the claim filed against the Fund must be dismissed or stayed and the hearing should not proceed until arbitration is sought and completed.

"A claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the Fund." Md. Code Ann., Bus. Reg. § 8-405(c) (Supp. 2014).

COMAR 09.08.01.25 provides:

A. A mandatory arbitration clause in a home improvement contract **shall include** the following information:

- (1) The name of the person or organization that will conduct the arbitration;

(2) Whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule;

(3) Whether the arbitrator's findings are binding; and

(4) A disclosure that, under Business Regulation Article, § 8-405(c), Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

B. The parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract.

C. This regulation shall apply to all home improvement contracts executed after October 31, 1994.

(Emphasis added.)

“[T]he interpretation of an agency rule is governed by the same principles that govern the interpretation of a Statute.” *Miller v. Comptroller of Maryland*, 398 Md. 272, 282, 920 A.2d 467, 473 (2007) (quoting *Maryland Com'n on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586, 592-93, 457 A.2d 1146, 1149 (1983)). The use of the word “shall” in a statute or a regulation is usually interpreted as imposing a mandatory requirement. COMAR 09.08.01.25 imposes mandatory requirements upon any MHIC-licensed contractor who attempts to include mandatory arbitration as part of the written agreement for a home improvement. Pursuant to section 8-405(c) of the Business Regulation Article “[a] claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the Fund;” yet, section 8-405(c) does not elaborate on what is necessary for “a written agreement.” COMAR 09.08.01.25 is the MHIC pronouncement and interpretation of what establishes “a written agreement” that would implement the application of section 8-405(c). As a matter of agency policy, the MHIC may reject the assertion there was “a written agreement” when the text of a

home improvement contract purporting to require that a dispute be submitted to arbitration fails to follow COMAR 09.08.01.25.

In a class action complaint against a contractor alleging breach of contract, fraud, and other claims, the Court of Special Appeals ruled that “the failure to comply with all of the requirements of COMAR 09.08.01.25 [did] not make the arbitration provision [in a civil complaint in a court of law] unenforceable.” *Case Handyman & Remodeling Servs., LLC v. Schuele*, 183 Md. App. 44, 68, 959 A.2d 833, 847 (2008). Subsequently, the ruling in *Case Handyman* was vacated by the Court of Appeals which held that the circuit court’s order in that case denying the contractor’s motion to compel arbitration was an interlocutory order, not a final judgment, and was not immediately appealable. *Schuele v. Case Handyman & Remodeling Servs., LLC*, 412 Md. 555, 989 A.2d 210 (2010) (vacating the lower appellant court’s decision and dismissed the appeal). By vacating the decision, the ruling in *Case Handyman* was annulled and set aside. On appeal, the Court of Appeals did not address the question as to whether the Court of Special Appeals had erred in holding that a home improvement contract’s arbitration provision may be judicially enforced even though the provision does not comply with the requirements imposed on such provisions under COMAR 09.08.01.25.

The arbitration clause that appears on the reverse side of the Contract at paragraph number eleven of the “General Terms and Conditions of Contract” was accurately quoted, above, at paragraph seven of the Motion. (Respondent Exhibit #1) There are no initials or date immediately adjacent to the text regarding arbitration that is found on the reverse side of the Contract form. There is no mention of the name of the person or organization that would conduct arbitration, mandatory fees, or a fee schedule. There is no specific mention that the arbitration findings are binding. There is no disclosure that a claim by a homeowner against the

Home Improvement Guaranty Fund would be stayed until completion of any mandatory arbitration proceeding. The Contract was a form contract that the Respondent, presumably, regularly utilizes with home improvement customers. The Respondent, as the drafter, is exclusively responsible for what is included or not included in the terms of the Contract.

Undoubtedly, the regulatory intent behind COMAR 09.08.01.25 is to bring attention to the existence and terms of a mandatory arbitration clause and provide notice to the parties, especially the homeowner, of certain information as a result of the inclusion of such a clause in a home improvement contract.<sup>3</sup> The signatures to the Contract appear only on the front side of the form and not on the reverse side where the arbitration clause is found. In addition, the arbitration clause is obscurely listed at the very end of a long list of “General Terms and Conditions of Contract” on the reverse side. (Respondent Exhibit #1) The Contract form falls far short of the mark in bringing the existence of a mandatory arbitration clause to the attention of a homeowner. Indeed, the Claimant testified, in a manner that seemed credible to the ALJ, that she was actually unaware of any arbitration clause in the Contract until the Respondent provided her with a copy of the Motion at the hearing.

This matter is not a civil case in a court of law. Unlike *Case Handyman*, this matter does not include consideration of whether an arbitration clause may be judicially enforced under principles of contract law even though the clause does not comply with the requirements of COMAR 09.08.01.25. This administrative adjudication is a claim against the Fund; and in this matter, prior disclosure as required by COMAR 09.08.01.25A(4) that any claim against the Fund will be stayed until arbitration is completed becomes critically important.

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<sup>3</sup> The Court of Special Appeals had held a similar view. “The unmistakable purpose of [COMAR 09.08.01.25B] is to ensure that all parties to a contract are aware of the existence and terms of the arbitration clause.” *Case Handyman & Remodeling Servs., LLC v. Schuele*, 183 Md. App. 44, 70, 959 A.2d 833, 848-49 (2008) *vacated, appeal dismissed*, 412 Md. 555, 989 A.2d 210 (2010).

In the attempt to make mandatory arbitration one of the terms of the Contract, the Respondent did not comply with any of the requirements found at COMAR 09.08.01.25. The Claimant's right to seek redress from the Fund should not be delayed or limited where notice in the Contract was not provided and the existence of the arbitration clause was not specifically brought to the Claimant's attention as required by the regulation. The ALJ finds no "written agreement" that would implement the application of section 8-405(c). Staying or dismissing the claim against the Fund would be contrary to agency policy and might encourage non-compliance with regulatory requirements by MHIC-licensed contractors. The Motion to Dismiss the claim and ~~hearing or to stay the claim and hearing until arbitration is sought and completed will not be~~ granted.

When he was questioned, the Respondent's representative acknowledged that after the Claimant made her initial \$2,640.00 payment there would be no other payments due and owing under the Contract until the home improvement work had been completed. The Contract reads "[i]n the event of a dispute arising between the parties relating to work, or workmanship to be performed, or payments due under and owing under this Contract," the provisions of the arbitration clause apply. (Respondent Exhibit #1, General Terms and Conditions, #11) As no work at the property was ever performed and no other payments were due and owing, an argument can be made that the nature of the dispute between the Claimant and the Respondent is not within the scope of disputes that are contemplated by the letter of the arbitration clause. As the Court of Appeals has held, "it is a basic principle of contract law that, in construing the language of a contract, ambiguities are resolved against the draftsman of the instrument." *John L. Mattingly Constr. Co. v. Hartford Underwriters Ins. Co.*, 415 Md. 313, 327, 999 A.2d 1066, 1074 (2010) (quoting *Burroughs Corp. v. Chesapeake Petroleum & Supply Co., Inc.*, 282 Md.



406, 411, 384 A.2d 734, 737 (1978)). Since the Respondent was the drafter of the Contract and the meaning of the quoted text is susceptible or more than one reasonable interpretation and, therefore, ambiguous, it is proper to interpret the language in the arbitration clause against the Respondent's interests and to reach a determination that the scope of disputes that are contemplated by the arbitration clause do not include the existing dispute between the Claimant and the Respondent.

For this valid reason, although cumulative, there is a separate footing to reject the Respondent's argument that the claim should be stayed (or dismissed) and the hearing not proceed until arbitration is sought and completed.

#### CLAIM AGAINST THE FUND

The Respondent maintains that the Claimant elected to rescind the Contract, but elected to do so only after her right of recession under the terms of the Contract evaporated. Therefore it follows, the Respondent argues, that the Claimant breached the agreement and the Respondent should be entitled to keep the deposit that was paid as liquidated damages. The Respondent's representative maintains that the contract was not abandoned without justification as the Respondent allegedly always stood ready (even now) to build the new deck at the property.

The Contract was signed and executed on April 18, 2012. By its terms, the Claimant could rescind the Contract by providing the Respondent with written notice, signed and dated, not later than April 21, 2012. In the Motion, the Respondent asserted that the Claimant had "her son telephone and cancel well beyond" April 21, 2012. (Motion to Dismiss, first page) In his initial testimony, the Respondent's representative stated that he got a telephone call from someone on April 19, 2012, who identified himself as the Claimant's son and who said that the Contract was too expensive and the Claimant wanted to cancel the home improvement work.

After it was brought to his attention that April 19, 2012 was only the next day after execution of the Contract, the Respondent's representative changed his testimony and stated that the Claimant's son had contacted him about a week after the execution of the Contract. (The Respondent's representative admitted that the Claimant, herself, had never contacted the Respondent and indicated a desire to cancel the Contract.)

The Respondent's representative further stated that someone who identified himself as an attorney representing the Claimant contacted the Respondent to advise that the Claimant had cancelled the contract. The Respondent's representative was unclear about the identity of the attorney or when this contact with an attorney, reportedly, occurred. In the Motion, there is no mention of any attorney acting on behalf of the Claimant in this matter. The Claimant testified that she never engaged any attorney to act on her behalf in this matter with the Respondent.

The Claimant testified that after she paid her deposit money, she waited for work to begin and nothing happened. According to the Claimant, between the end of May 2012 and July 15, 2013, she made repeated telephone calls (over five telephone calls) to the Respondent and spoke with individuals who identified themselves as the Respondent's agents or employees asking when work on her new deck would begin. The individuals that the Claimant spoke with made excuses about the delay; however, after each of her calls, the Claimant was not re-contacted by anyone representing the Respondent. Among other excuses, the Claimant was told that that the Respondent's workers were occupied with other home improvement projects. The Claimant indicated that on July 15, 2013, after she had lost patience with the delay, she filed a complaint with the Howard County Office of Consumer Affairs regarding the Respondent. In pertinent part, the complaint reads that she had "called and they said they were behind and I would have to wait so I did." (Claimant Exhibit #2) The Claimant indicated that she had her son contact the

Respondent about cancelling the Contract, but only after she had given up hope on the Respondent performing the work at about the same time she had filed her complaint with the Howard County Office of Consumer Affairs. After she filed that complaint, the Claimant no longer wanted the Respondent to perform the home improvement work as financing had not been arranged and she had no money on-hand to pay the balance that would be owed for completion of the work. The Claimant's testimony, although at times somewhat vague, was consistent.

In his testimony, the Respondent's representative indicated also that after the Claimant's son had advised over the telephone that the Claimant wanted recession, the Respondent had mailed a letter to the Claimant reflecting that she was free to initiate arbitration if she had a dispute concerning the Contract. The Respondent's representative further stated that at the end of May 2012, the Respondent had mailed a letter to the Claimant indicating it was prepared to proceed with the home improvement work at the property.

The Claimant testified that she never received any written correspondence by mail of any nature from the Respondent.

The Respondent maintains that two business letters were mailed to the Claimant. It would be expected that any contractor would have retained copies of such business letters under these circumstances. Yet, the Respondent's representative indicated during the hearing that copies were unavailable. The only somewhat-contemporaneous document in the record that might shed light as to what was delaying performance of work at the property is the copy of the complaint filed with the Howard County Office of Consumer Affairs regarding the Respondent. As quoted above, the complaint suggests that the delay was the result of the Respondent's neglect of an obligation to perform the work, not the Claimant's desire to rescind the Contract.

The Respondent's representative also testified that plans to build the new deck were drawn up on a computer. (Copies of these plans were not provided to the Claimant and no copy was offered into the record.) Curiously if, as the Respondent's representative testified, the Claimant's son had informed the Respondent's representative within a week that the Claimant had cancelled the home improvement work, why would installation plans be drawn up on a computer?

On numerous points, the evidence in the record is in conflict and presents two completely different versions of events. The versions are so dissimilar, that the ALJ must accept one version of events and reject the other. As reflected in the Findings of Fact and for the reasons discussed above, insofar as there is conflict, the ALJ accepts the Claimant's testimony as more credible and reliable and rejects the testimony from the Respondent's representative.

The parties agree that the Claimant never provided the Respondent with written notice, signed or unsigned, that she wanted to cancel the Contract. In her testimony, the Claimant indicated that she did not want to cancel the contract until on or about July 15, 2013. The Contract listed the approximate start date of the work as May 15, 2012 and the approximate completion date as May 31, 2012. The Respondent never delivered any materials at the property and performed no work. After April 18, 2012, no worker, agent, or sales representative of the Respondent came to the property. The Respondent did not obtain a building permit for the home improvement work. The ALJ accepts the Claimant's testimony that after April 18, 2012 neither the Respondent (individual), nor anyone representing the Respondent (LLC), initiated contact with her at any relevant point in time, and that she did not want to cancel the contract until on or about July 15, 2013.

The Contract specified that “[a]ll starting and completion dates are approximate and subject to delays caused by circumstances and conditions beyond [the Respondent’s] control, including but not limited to strike, material shortages, fire, flood and other acts of God, or by delays caused by Owner.” (Respondent Exhibit #1, para. 8) Yet, there is no credible and reliable evidence that any circumstance or condition beyond the Respondent’s control or any delay caused by the Claimant delayed the performance of the contracted home improvement work at the property.

The Respondent solicited home improvement work from the Claimant through the use of a telemarketer. The Respondent’s sales representative went to the property, met the Claimant, executed the Contract, and obtained a \$2,640.00 deposit for building a deck on the property. The Contract specified that the new deck would be completed in approximately forty-five days. However, after being paid \$2,640.00, the record reflects that the Respondent failed to make any attempt to perform the home improvement work. The Claimant repeatedly contacted the Respondent’s agents/employees and requested the work commence on building the deck. The Respondent ignored the Claimant’s requests. From the lack of response, the ALJ has drawn the reasonable and permissible inference that the Respondent’s continued delay was willful. After a year had gone by, the Claimant lost patience with the delay and wanted her money back. At this point, the Claimant no longer wanted the new deck at the property as financing had not been arranged for the balance that would be owed for the completion of the work and she could not otherwise pay the balance. The Claimant’s change of mind is understandable. Clearly, such a lengthy delay amounts to a violation of the Respondent’s obligations to perform the work within the time or an approximation of the time specified under the Contract. The Respondent’s lengthy delay in performance of the home improvement work is not reasonable, cannot be tolerated in a

MHIC-licensed contractor, and demonstrates the Respondent had, constructively, abandoned the Contract.

#### CALCULATION OF ACTUAL LOSS

Because of the Respondent's "misconduct" described above, the Claimant has established an entitlement to reimbursement on her claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. 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.

COMAR 09.08.03.03B(3)(b) and (3)(c) do not apply to the facts as found. The ALJ will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(a). The Claimant paid \$2,640.00 to the Respondent as a deposit under the Contract. The Respondent is deemed to have abandoned the Contract without doing any work. Pursuant to COMAR

09.08.03.03B(3)(a), the Claimant has demonstrated an “actual loss” of \$2,640.00. Md. Code Ann., Bus. Reg. § 8-401.

**PROPOSED CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the claim against the Fund should not be dismissed or stayed because there was no “written agreement” for mandatory arbitration within meaning of section 8-405(c) of the Business Regulation Article of the Annotated Code of Maryland, and/or the instant claim against Fund was not within the scope of disputes governed by the arbitration clause drafted by the Respondent. Md. Code Ann., Bus. Reg. § 8-405(c) (Supp. 2014); COMAR 09.08.01.25.

Based on the foregoing Findings of Fact and Discussion, the ALJ also concludes as a matter of law that the Claimant has sustained a \$2,640.00 “actual loss” as a result of the Respondent’s acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3)(a).

**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 Respondent’s Motion to Dismiss Hearing and Complaint be DENIED; and further,

ORDER that the Claimant be awarded \$2,640.00 from the Maryland Home Improvement Guaranty Fund to compensate her for “actual losses” sustained by the “acts and omissions” of the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further,

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

**Signature on File**

January 7, 2015  
Date Decision Issued

Stephen J. Nichols  
Administrative Law Judge

SJN/da  
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