

IN THE MATTER OF THE CLAIM	* BEFORE KERWIN A. MILLER, SR.,
OF RICHARD DEANER,	* 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 MICHAEL	*
BOWMAN, T/A ABOVE THE BEST	* OAH No.: DLR-HIC-02-16-13703
REMODELING AND EXCAVATING,	* MHIC No.: 15 (05) 244
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On January 18, 2016, Richard Deaner (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$16,686.00¹ in alleged actual losses suffered as a result of a home improvement contract with Michael Bowman, trading as Above the Best Remodeling and Excavating (Respondent).

¹ At the hearing, the Claimant made a motion to amend his claim (Motion) for reimbursement from the Fund from \$16,686.00 to \$49,015.00, citing that he received this new amount from a new contractor. Both the Respondent and the Fund objected to the amendment, claiming that the Respondent would be unfairly prejudiced by the proposed amendment because he was on notice to defend a \$16,686.00 claim, not a \$49,015.00 claim. After hearing arguments on the Motion, I denied the Claimant's Motion based on the fact that the Claimant failed to establish that 1) he did not know and could not have reasonably ascertained the facts on which the proposed amendment was based at the time the claim was filed; and 2) the proposed amendment would not prejudice the Respondent. Code of Maryland Regulations (COMAR) 09.08.03.02C.

I held a hearing on October 14, 2016 at Bel Air Branch Library, 10 E. Pennsylvania Avenue, Bel Air, MD 21014. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).² The Claimant represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself. The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
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:

- Clmt. Ex. 1 - Photos of Claimant's Home, undated
- Clmt. Ex. 2 - Contract, undated
- Clmt. Ex. 3 - Check #2748, dated November 17, 2011
- Clmt. Ex. 4 - Check #2759, dated December 15, 2011
- Clmt. Ex. 5 - Check #2760, dated December 15, 2011
- Clmt. Ex. 6 - Check #2761, dated December 15, 2011
- Clmt. Ex. 7 - Proposal with related check #2780, dated April 25, 2012
- Clmt. Ex. 8 - Letter from the Claimant to the Respondent, dated July 24, 2013
- Clmt. Ex. 9 - Photos of Equipment, undated
- Clmt. Ex. 10 - Letter from the Claimant to the Respondent, dated December 20, 2013
- Clmt. Ex. 11 - Letter from the Respondent to the Claimant, dated January 20, 2014
- Clmt. Ex. 12 - Photos of Chimney Leak, undated
- Clmt. Ex. 13 - Miscellaneous Photos, undated
- Clmt. Ex. 14 - Photo of Back Sidewalk, undated
- Clmt. Ex. 15 - The Carpenter's Son, Inc. Kitchen Proposal, dated August 6, 2016

² Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

- Clmt. Ex. 16 - The Carpenter's Son, Inc. Bathroom Proposal, undated
- Clmt. Ex. 17 - The Carpenter's Son, Inc. Living Room and Dining Room Proposal, undated
- Clmt. Ex. 18 - The Carpenter's Son, Inc. Hallway, Doors and Moldings Proposal, undated
- Clmt. Ex. 19 - The Carpenter's Son, Inc. Floors and Garage Door Proposal, undated
- Clmt. Ex. 20 - The Carpenter's Son, Inc. Exterior Windows Proposal, undated
- Clmt. Ex. 21 - The Carpenter's Son, Inc. Front and Back Porch Proposal, undated
- Clmt. Ex. 22 - Above the Best Change Orders, dated December 14, 2011
- Clmt. Ex. 23 - MultiTech Construction Management Corporation Cost Analysis and Independent Cost Conclusions, dated October 17, 2016

I admitted the following exhibits on the Respondent's behalf:³

- Resp. Ex. 2 - Diagram of the Claimant's porch, undated
- Resp. Ex. 3 - Roils Stocks Invoice, undated

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated July 5, 2016
- Fund Ex. 2 - Hearing Order, dated April 22, 2016
- Fund Ex. 3 - Respondent's Licensing History, dated October 13, 2016
- Fund Ex. 4 - Home Improvement Claim Form, dated January 18, 2016
- Fund Ex. 5 - MHIC Letter to the Respondent, dated April 20, 2016

Testimony

The Claimant testified in his own behalf and presented the testimony of Volney Ford, President of MultiTech Construction Management Corporation, accepted as an expert in construction estimation.⁴

The Respondent testified in his own behalf and did not present any additional witnesses.

The Fund did not present any witnesses.

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 4675949.

³ Resp. Ex. 1 was offered and not admitted.

⁴ All parties stipulated that Mr. Ford was an expert in construction estimation.

2. In October, 2011⁵ the Claimant and the Respondent entered into a contract to perform the following work on the Claimant's home located at 105 South Lynbrook Road, Bel Air, MD 21014:

Kitchen - Install archway in door opening between hallway and kitchen. Install leaded glass in five (5) large wall hung cabinet doors. Change out hinges and hardware on cabinets (customer supplied). Install three (3) lights in kitchen (customer supplied). Install three (3) extra receptacles and change over to G.F.I. circuits. Install 2 ¼ inch crown molding on wall cabinets. Install crown molding on ceiling. Install tile back splash after granite is set (by others) grout and seal (customer supplied). Tear out kitchen flooring down to sub-floor. Install 5 inch Plank hardwood flooring (customer supplied). Install largest possible French doors between dining room and kitchen. All painting by others. Install molding on kitchen doors. Install wood archway above stove. Install customer supplied appliances.

Bathroom - Tear out complete bathroom/all but ceilings down to studs. Install exhaust fan in ceiling (customer supplied). Install new sub-floor. Install new tub (customer supplied). Install new diverter (customer supplied). Install new plumbing down to basement joist. Install new waste and overflow (customer supplied). Install new plumbing for sink down to joist. Install Durock in shower area. Install green board on all other walls. Install subway tile in shower area (grout and seal) (customer supplied). Install floor tile and baseboards (customer supplied). Install grout and sealer (customer supplied). Install toilet (customer supplied), install sink (customer supplied). Install any and all trim and towel bars, toilet paper holders, etc. (customer supplied). All painting by others.

Living Room - Tear out exterior front door. Install new 36 inch exterior door (customer supplied). Install new 36 inch storm door (customer supplied). Install all necessary moldings. Install archway leading into hallway.

Dining Room - Install trim boxes on walls. Install drywall archway.

Hallway - Build two (2) nooks in hall on wall approximately 2' x 2'.

Doors and Moldings - Tear out all base moldings. Tear out closet doors. Tear out interior doors. Install all new interior doors (customer supplied). Install all new closet doors (customer supplied). Install all new hardware and trim (customer supplied). Install all new baseboards and shoe (customer supplied). All painting by others.

Floors - Sand out hardwood floors. Re-stain floors (customer choice). Poly four (4) coats.

⁵The contract between the Claimant and the Respondent was undated. However, both parties agreed that Clmt. Ex. 2 is the actual contract that the parties agreed to. Additionally, both parties agreed that the contract, though undated, was agreed upon sometime in October, 2011.

Garage Door - Tear out old garage door. Install new garage door (customer supplied). Install metal wrap. Install weather trim. Install trim around brick (customer supplied).

Exterior Windows - Tear out all exterior windows. Re-frame as necessary. Install new windows (customer supplied). Insulate. Install metal wrap. Install exterior trim. Install exterior shutters (customer supplied).

3. The contract contained no start or completion date.
4. The original agreed-upon contract price was \$25,100.00.
5. On November 17, 2011 the Claimant paid the Respondent \$8,300.00 on the original contract.
6. The Respondent began work on the contract on November 17, 2011.
7. On December 14, 2011, the Claimant negotiated additional electrical and archway work by the Respondent for \$1,562.00. A change order for this additional work was prepared on December 14, 2011.
8. On December 15, 2011, the Claimant paid the Respondent \$8,300.00 on the original contract.
9. On December 15, 2011, the Claimant paid the Respondent \$1,562.00 for the December 14, 2011 change order.
10. No work was done on the contract between the week before Christmas, 2011 and March, 2012.
11. In March, 2012, the Claimant bargained for additional work on his front and back porch for \$16,119.00. A change order for this additional work was prepared in April, 2012.
12. On April 25, 2012, the Claimant paid the Respondent \$5,366.00 on the April, 2012 change order.
13. The Respondent continued work on the contract between March, 2012 and August, 2012.

14. The Respondent never returned to the Claimant's property to perform work on the contract after August, 2012. The work on the Claimant's home was incomplete at that time.

15. The Respondent left equipment at the Claimant's home in August, 2012, and never returned to retrieve the equipment.

16. On July 24, 2013, the Claimant mailed a letter to the Respondent inquiring as to when the Respondent would return to finish the work on the contract.

17. On December 20, 2013, the Claimant mailed a letter to the Respondent requesting return of the money paid in advance of the work on the contract that was not completed.

18. On January 20, 2014, the Respondent mailed a letter to the Claimant indicating that he did not intend to return to the Claimant's home to continue work on the contract.

19. On August 6, 2016, the Claimant received an estimate from The Carpenter's Son, Inc. regarding the work contracted for with the Respondent that needed to be corrected, repaired or completed. The estimate was \$49,015.00.

20. The total fair market value of the contracted work not completed by the Respondent was \$41,144.00.

21. The Claimant's actual loss is \$21,891.00.

22. On January 18, 2016, the Claimant filed a claim with the MHIC, requesting reimbursement of \$16,686.00 from the Fund.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁶ "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and

⁶ As noted above, "COMAR" refers to the Code of Maryland Regulations.

produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125 n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

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); *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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Without dispute, the Claimant and the Respondent both agree that the parties entered into a home improvement contract in October, 2011 to renovate the Claimant’s home located at 105 South Lynbrook Road, Bel Air, MD 21014. They agree that the total contract price on the original contract was \$25,100.00 and that the Claimant paid the Respondent \$16,600.00 on the original contract. The parties agree that they subsequently bargained for the Respondent to perform additional work on the Claimant’s home in the amounts of \$16,119.00 for work on the Claimant’s front and back porch, \$662.00 for some electrical work, and \$900.00 for some archway work. It was undisputed that the Claimant paid the Respondent the entire \$1,562.00 for the additional electrical and archway work and \$5,366.00 for the additional work on the Claimant’s front and back porch.

Both parties agree that the Respondent began work on the Claimant’s home on November 11, 2011. They also agree that no work was performed by the Respondent from the week before Christmas, 2011 until March, 2012. The Respondent testified that the reason for the long break in work was because the Claimant had not yet secured certain materials he was required to supply under the contract in order for him to continue working. The Claimant testified that he

had left several messages for the Respondent regarding his absence between Christmas, 2011 and March, 2012 but was unsuccessful in reaching him. He further testified that when he did finally get in touch with the Respondent in March, 2012, the Respondent informed him that there must have been some sort of miscommunication because the Respondent did not work right after the holidays. I find the Claimant's testimony on this issue is more credible than the Respondent's testimony. The evidence is unchallenged that the Claimant made several attempts to reach the Respondent during this period of inaction and that the Respondent did not communicate with the Claimant for several months. The evidence is also unchallenged that during this period of inaction, the Respondent never inquired as to whether the Claimant was trying to reach him because he had secured the material that the Respondent alleges that he needed in order to continue work on the Claimant's home improvement project. Additionally, the Respondent never alleged that he did not receive the Claimant's messages or that he sent the Claimant any correspondence during that period of time explaining his absence.

The parties are also in agreement that the Respondent resumed work on the Claimant's home from March, 2012 until August, 2012. It is undisputed that the home improvement project was incomplete in August, 2012 and that the Respondent had not returned to the Claimant's home since that time. The Claimant testified that he made several calls to the Respondent that went unanswered but thought that the Respondent was taking a break like he did between Christmas, 2011 and March, 2012. He further testified that after several months went by with no response from the Respondent, he sent a letter to the Respondent on July 24, 2013 to determine when the Respondent would return to the project. When he did not receive a response to his July, 24, 2013 letter, the Claimant sent another letter to the Respondent requesting a return of the advances he paid the Respondent on the contract. The Respondent testified that he did not return to the project after August, 2012 because he ran out of work as a result of the Claimant's failure

to secure various materials he was required to provide under the contract in order for the Respondent to complete the project. I find the Respondent's testimony is not supported by the evidence. The Respondent acknowledged that he received the Claimant's numerous calls, as well as his July 24, 2013 letter regarding the Respondent's return to the project, but chose not to respond. At no time between August, 2012 and December, 2013 did he send any correspondence to the Claimant indicating that he was waiting on the Claimant to secure certain materials before he would return. Additionally, the fact the Respondent never answered or responded to the Claimant's calls for almost a year makes it less likely that he was waiting for the Claimant to let him know when he secured certain materials for the project so he could return to complete the project.

Finally, Volney Ford testified as an expert in construction estimation. His testimony was uncontested that after inspecting the Claimant's home, as well as the original contract and change orders, the total fair market value of the contracted work not completed by the Respondent was \$41,144.00. The Fund did not contest the Claimant's evidence and agrees that this amount is not unreasonable. Accordingly, I am satisfied that the Claimant established a compensable actual loss because of the Respondent's omission or, in this case, abandonment, of the home improvement. Md. Code Ann., Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2).

I thus find that the Claimant is eligible for compensation from the Fund. Before I discuss the specifics of an award, I will briefly discuss the statute of limitations in this type of case. The Business Regulation Article provides: "A claim shall be brought against the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405. Upon hearing that the Claimant filed a claim in 2016 related to a contract signed in 2011, it would seem that the statute of limitations

might bar the claim. After hearing the Claimant's testimony, however, I find that his 2016 filing was within the three-year period after which he discovered, or should have discovered, his loss.

At the hearing, the Claimant testified that he first became aware that the Respondent would not be returning to his home to complete the work on the contract when he received the Respondent's letter dated January 20, 2014. He further testified that he did not consider the Respondent having abandoned the project during the August, 2012 to January, 2014 period of inactivity because the Respondent had gone months without communicating with the Claimant in the past only to return at some point to continue work on the project. Additionally, the Claimant argued that the fact that the Respondent left equipment at his home further supported his belief that the Respondent had not abandoned the project from August, 2012 to January, 2014. Given the Respondent's history of leaving the project for several months in the past without contact with the Claimant, coupled with the fact that equipment was left behind at the Claimant's home, the Claimant's belief that the Respondent would return to work on the project at some point was reasonable. However, the Claimant's belief in the Respondent's return was only reasonable to a point. I believe that point to be February, 2013. The Respondent's inactivity on the project between August, 2012 to February, 2013 is consistent with his prior history during the project, especially in light of the fact that he had left equipment at the Claimant's home. I find that the Claimant was or should have been aware that the respondent abandoned the project in February, 2013. Therefore, his claim is not barred by the statute of limitations because he filed his claim with the MHIC on January 18, 2016, within three years of when he discovered, or should have discovered, his loss.

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR

09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Using the above formula, I have determined the Claimant's actual loss to be \$21,891.00 as shown below:

Amount paid to the Respondent:	\$23,528.00
<u>Plus amount paid to complete the project:</u>	<u>\$41,144.00</u>
	\$64,672.00
<u>Minus the original contract price:</u>	<u>\$42,781.00</u>
Actual Loss:	\$21,891.00

Pursuant to the applicable law, 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), (5). As I indicated above, I denied the Claimant's Motion to amend his reimbursement claim from \$16,686.00 to \$49,015.00. Therefore, because the Claimant only claimed \$16,686.00 in reimbursement from the Fund in his January 18, 2016 Home Improvement Claim Form, I recommend that the Fund award the Claimant for an actual loss sustained in the amount of \$16,686.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$16,686.00 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 Guaranty Fund award the Claimant \$16,686.00; 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 (10%) as set by the Maryland Home Improvement Commission;⁷ and

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

Signature on File

January 26, 2017
Date Decision Issued

Kerwin A. Miller, Sr. JLG
Administrative Law Judge

KAM/dlm
#166371

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of March, 2017, 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

MEMORANDUM

TO : [Illegible]

FROM : [Illegible]

SUBJECT : [Illegible]

[Illegible text follows, consisting of several paragraphs of faint, mostly unreadable text.]