

IN THE MATTER OF THE CLAIM
OF ANASTASIA G. LOLAS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF FRED BERGER,
T/A FRED BERGER DESIGN AND
BUILD, LLC,
RESPONDENT

* BEFORE MICHAEL J. WALLACE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-15-37647
* MHIC No.: 15(90)848
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PROPOSED DECISION

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STATEMENT OF THE CASE

On April 21, 2015, Anastasia G. Lolas (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) in the amount of \$16,397.98 for reimbursement for alleged actual losses suffered as a result of a home improvement contract with Fred Berger, trading as Fred Berger Design and Build, LLC (Respondent).

I convened a hearing on April 18, 2016, at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant was present and represented herself. The Respondent failed to appear for the hearing. Jessica Kauffman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), MHIC, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (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 behalf of the Claimant:

- Cl. Ex. 1 Letter from Claimant to MHIC, dated April 18, 2015
- Cl. Ex. 2 Letter of Proposal from Respondent to Claimant, dated August 28, 2010
- Cl. Ex. 3 Emails from Claimant to Montgomery County Department of Permitting Services (DPS), dated March 6, 2014
- Cl. Ex. 4 Emails between Claimant and Respondent from July 18, 2014 to December 30, 2014
- Cl. Ex. 5 Memorandum from Claimant to Montgomery County DPS, dated January 11, 2015, with attachments
- Cl. Ex. 6 Email from Respondent to Claimant, dated April 26, 2011

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

- Cl. Ex. 7 Claimant's bank statements, showing payments made to Respondent
- Cl. Ex. 8 Series of photographs showing examples of Respondent's work
- Cl. Ex. 9 Estimate from Polbuild Contractors, dated April 15, 2015
- Cl. Ex. 10 Proposal from Bates Repair and Renovation, LLC (Bates), dated March 17, 2015
- Cl. Ex. 11 Copies of checks paid to Bates and invoices from Fisher Lumber
- Cl. Ex. 12 MHIC licensing history of Bates
- Cl. Ex. 13 Montgomery County DPS, Data Search

No documents were submitted on behalf of the Respondent.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, dated February 17, 2016, with certified mail receipts
- Fund Ex. 2 Transmittal letter from the MHIC with attached Hearing Order, dated November 6, 2015 and Home Improvement Claim Form, received April 21, 2015
- Fund Ex. 3 The Respondent's licensing history, dated March 21, 2016
- Fund Ex. 4 Maryland Motor Vehicle Administration, Driving Record Information for Respondent, dated July 20, 2015
- Fund Ex. 5 Claim Transmittal Letter from DLLR to Respondent, dated May 4, 2015

Testimony

The Claimant testified on her own behalf. There was no testimony presented on behalf of the Respondent or the Guaranty Fund.

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 01-80824. His license will expire on November 30, 2017. The license is currently suspended as a result of a Guaranty Fund matter unrelated to this case.
2. On or about August 28, 2010, the Claimant and the Respondent entered into a contract to provide home improvement services at the Claimant's home located in Olney,

Maryland. The contract called for the conversion of a carport into an enclosed garage. To be included was the digging and installation of a foundation, framing of walls, installation of doors, windows, electric, drywall, and insulation. All work was to be done according to applicable county code and permits were to be secured by the Respondent prior to work being performed.

3. The contract price for the entire project including the above work was \$15,835.00 plus change orders in the amount of \$725.00 bringing the total amount to \$16,560.00.

4. Work on the project began in August 2010 and was completed in April 2011.

5. The Claimant made six payments to the Respondent between September 2010 and May 2011 totaling \$16,560.00.

6. By early 2012, the Claimant had problems with water intrusion into the garage and noticed that mold was forming on the drywall in the interior portion of the garage. Over time, the ceiling drywall began to sag and water was coming into the garage through the side door.

7. The Claimant attempted to make some repairs herself but the problems persisted.

8. By March 2014, the Claimant discovered that the Respondent did not secure any permits from the Montgomery County DPS for the project.

9. The Claimant immediately contacted the Respondent who initially failed to respond to the Claimant. The Claimant secured the services of an attorney who persisted in attempts to contact the Respondent.

10. The Respondent finally responded stating that he would cure the problems with the garage but by December 2014, the Respondent failed to take any steps to cure the problems and failed to have any further contact with the Claimant or her attorney.

11. In January 2015, the Claimant contacted the Montgomery County DPS to secure permits and was told to submit drawings of the project.

12. The Claimant provided a copy of the drawing that the Respondent originally gave her and she was ultimately told that the plans and specifications that the Respondent created to be used in building the garage failed to comply with the Montgomery County building code.

13. In addition, the Claimant discovered that there was no footer at the perimeter of the garage, the entry door into the kitchen from the garage was not a fireproof, solid door, electric boxes were not installed, and the portals for windows and doors were not properly framed.

14. On or about March 17, 2015, the Claimant contracted with Bates, a licensed home improvement contractor, to repair and/or replace the work done by the Respondent. The cost for this work as it related to the repair and replacement of the work done by the Respondent was \$16,397.98.

15. Bates completed all of the work under this contract.

16. On April 21, 2015, the Claimant filed a claim for reimbursement from the Fund in the amount of \$16,397.98.

DISCUSSION

Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a), § 8-407(a). On February 17, 2016, the OAH mailed a Notice to the Respondent via regular and certified mail using his address of record with the MHIC as well as with the Maryland Motor Vehicle Administration. The Notice advised the Respondent that a hearing on the Claimant's claim against the Fund was scheduled for April 18, 2016, that it would begin at 10:00 a.m., and would be held at the OAH-Kensington, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. The address on the Notice is the address in the MHIC

database and is the Respondent's address of record according to records of the Motor Vehicle Administration and, in fact, the Respondent accepted delivery of the Notice. As such, it was established that the Respondent received adequate notice of the hearing.

On April 18, 2016, I convened the hearing in accordance with the Notice. The Respondent, however, failed to appear for the hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear. Since the Respondent received due notice of the hearing, I concluded that he was afforded an opportunity to participate in the hearing, but failed to appear. Accordingly, I found it appropriate to proceed in the Respondent's absence. COMAR 09.01.02.09.

Merits of Claimant's Claim

A homeowner 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.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements on the Claimant's home.

It is undisputed that the Respondent was a licensed home improvement contractor under MHIC license number 01-80824 at all times relevant to this case. His license is currently valid but suspended.

On or about August 28, 2010, the Claimant and the Respondent entered into a contract to convert the Claimant's carport into a garage at the Claimant's home located in Olney, Maryland. The work was to include digging and installing a foundation, framing walls, installing doors, windows, electric, drywall, and insulation. All work was to be done according to applicable county code and permits were to be secured by the Respondent prior to work being performed. The contract price for the entire project, including the above work, was \$15,835.00 plus change orders in the amount of \$725.00 bringing the total amount to \$16,560.00. Work on the project began in August 2010 and was completed in April 2011 and the Claimant paid the total costs in full over six payments totaling \$16,560.00. By early 2012, however, the Claimant had problems with water intrusion into the garage and noticed that mold was forming on the drywall in the interior portion of the garage. Over time, the ceiling drywall began to sag and water was coming into the garage through the side door. The Claimant attempted to make some repairs herself but the problems persisted. The Claimant then made an inquiry with the Montgomery County DPS to see what permits were issued for the project and discovered that the Respondent did not secure any permits from the Montgomery County DPS for the project. Upon learning this, the Claimant immediately contacted the Respondent who initially failed to respond to the Claimant's calls and emails. The Claimant subsequently secured the services of an attorney who persisted in attempts to contact the Respondent. The Respondent finally responded stating that he would cure the problems with the garage but by December 2014, the Respondent failed to take any steps to cure the problems and failed to have any further contact with the Claimant or her attorney.

In January 2015, the Claimant contacted the Montgomery County DPS to secure permits so she could hire someone to begin making repairs and was told to submit drawings of the project. She provided DPS with a copy of the drawing that the Respondent originally gave her and she was told that the plans and specifications that the Respondent created to be used in

building the garage failed to comply with the Montgomery County building code and that she could not obtain a use and occupancy permit until the defects with the garage were corrected. Upon inspection of the garage, along with all of the other problems noted by the Claimant, she learned that there was no footer at the perimeter of the garage, the entry door into the kitchen from the garage was not a fireproof, solid door, electric boxes were not installed, and the portals for windows and doors were not properly framed, all in violation of local building codes.

On or about March 17, 2015, the Claimant contracted with Bates to repair and/or replace the work done by the Respondent. The cost for this work as it related to the repair and replacement of the work done by the Respondent was \$16,397.98. The Claimant hired Bates to do the work which was ultimately completed to the Claimant's and the County's satisfaction.

The Respondent did not refute the claims of the Claimant as he was not present during at the hearing, despite being notified of the hearing. I find, therefore, that the Respondent performed unworkmanlike work on the garage addition. I also find that the Claimant is eligible for compensation from the Fund for the poor work done by the Respondent on the garage.

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).

The Claimant's actual loss is calculated after considering that she contracted with the Respondent for a total amount of \$16,560.00 and actually paid that amount. The Claimant also established that she paid Bates in the amount of \$16,397.98 to repair and/or replace the Respondent's unworkmanlike product.

The award from the fund is, therefore, computed as follows:

Amount paid to the Respondent	\$16,560.00
Amount paid to complete/repair work contracted to Respondent	<u>+16,397.98</u>
Subtotal	\$32,957.98
Minus original contract price	<u>-16,560.00</u>
Award amount	\$ 16,397.98

Based on the above considerations, the Claimant is entitled to a reimbursement from the Fund in the amount of \$16,397.98. Md. Code Ann., Bus Reg. §8-405 (e)(1).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$16,397.98 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

PROPOSED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$16,397.98;

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;² and

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

May 25, 2016
Date Decision Issued

Signature on File

Michael J. Wallace
Administrative Law Judge

MJW/da
162361

² See Md. Code Ann., Bus. Reg. § 8-410(a); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 29th day of June, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION