

IN THE MATTER OF THE CLAIM
OF MATTHEW BRODAK-SONG

AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF JAMES INSLEY t/a
THREE J CONSTRUCTION, LLC

* MARYLAND HOME IMPROVEMENT
COMMISSION

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* MHIC CASE NO. 16(05)899
* OAH CASE NO. DLR-HIC-02-17-02684
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FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on May 10, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on August 7, 2017, concluding that the homeowners Matthew Brodak-Song and Sophie Brodak-Song ("Claimants") sustained an actual and compensable loss of \$9,000.00 as a result of the acts and omissions of the contractor James Insley t/a Three J Construction, LLC ("Contractor"). *ALJ Recommended Decision* p. 14. In a Proposed Order dated September 12, 2017, the Maryland Home Improvement Commission ("MHIC") affirmed the Recommended Decision of the ALJ to award the Claimant's \$9,000.00 from the MHIC Guaranty Fund. Both the Contractor and the Claimants subsequently filed exceptions of the MHIC Proposed Order.

On February 15, 2018, a hearing on the exceptions filed in the above-captioned matter was held before a two-member panel ("Panel") of the MHIC. The Claimants and the Contractor were present without counsel. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. Pursuant to Maryland Annotated Code, Business Regulation Article ("BR") §8-313(b), a hearing panel of the Commission is to consist of three Commission members. One of the Commission members scheduled to participate in this hearing did not appear. The Contractor and the Claimant were asked at the outset of the hearing whether they wished to proceed with a hearing panel consisting of only two

members or have their hearing postponed so that a full three-member hearing panel could be present to hear the case. Both the Contractor and the Claimants agreed to proceed with the two-member panel.

At the exceptions hearing the Panel addressed a request to admit additional evidence submitted by the Claimants. The test that must be met in order to admit additional evidence at an exceptions hearing is found at Code of Maryland Regulations ("COMAR") 09.01.03.09K, under which a party must prove that the additional evidence: (1) Is relevant and material; (2) Was not discovered before the ALJ hearing; and (3) Could not have been discovered before the ALJ hearing with the exercise of due diligence. The Claimants were given the opportunity to present oral argument regarding their request for the admission of additional evidence. The Panel found that the Claimants had not met the test under COMAR 09.01.03.09K. After denying the Claimants' request to present additional evidence, the Panel allowed the parties to present further argument as to why the ALJ's decision should be modified or overturned.

The Claimants contend that included in the price of the original contract was a discount of \$3,000, and the ALJ erred when he did not take this discount into consideration when calculating the amount of actual loss in this case. On page 5 of his decision, the ALJ breaks the scope of work agreed to by the parties into six components and lists the agreed upon price charged for each component. The ALJ found that the total price for these components was \$83,000. *ALJ Recommended Decision* p. 5. The ALJ then applied the \$3,000 discount and found that the total fee charged by the Contractor under the contract was \$80,000. *ALJ Recommended Decision* p. 5. This list of six components, the corresponding price for each component, and the \$3,000 discount are pulled directly from the written contract between the parties. *OAH Hearing Claimants' Exhibit 1*. When the ALJ calculated the actual loss, he

appropriately used the formula set forth in COMAR 09.08.03.03B(3)(b) which takes the amount paid to the original contractor and subtracts the value of any materials or services provided by the contractor. *ALJ Recommended Decision* p. 13. The ALJ found the value of any materials or services provided by the Contractor to be \$56,000 by adding the Contractor's prices for the four components of the contract the ALJ found the Contractor had completed. *ALJ Recommended Decision* p. 13. The prices used by the ALJ, however, do not include the \$3,000 discount that was part of the negotiated contract. The Commission finds that the \$3,000 discount should have been taken into consideration in the calculation of actual loss and amends the ALJ's decision to include the discount as follows.

Because the ALJ's calculation of actual loss takes into consideration the price of components 1, 2, 5 and 6 of the contract, and the \$3,000 discount applied to all six components of the contract, the discount needs to be prorated across all six components to see how it will affect the cost of the four components the ALJ found to be completed. The following chart shows how the discount is prorated across the components of the contract:

Original price of the 6 components of the Contract.	Percentage of discount to be applied to each component.	Prorated discount of each component.	Discount to be subtracted from total value of materials and services provided by contractor.
#1 \$4,500	5.42%	\$162.65	\$162.65
#2 \$30,000	36.14%	\$1,084.34	\$1,084.34
#3 \$19,500	23.49%	\$704.82	
#4 \$7,500	9.04%	\$271.08	
#5 \$6,500	7.83%	\$234.94	\$234.94
#6 \$15,000	18.07%	\$542.17	\$542.17

TOTAL: \$83,000	100%	\$3,000	\$2,024.10
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When the discount is prorated, the price for components 1, 2, 5 and 6 is reduced by a total of \$2,024.10. This brings the ALJ's value of any materials or services provided by the Contractor down from \$56,000 to \$53,975.90 (Component 1 \$4,337.35 + Component 2 \$28,915.66 + Component 5 \$6,265.06 + Component 6 \$14,457.83).

The Claimants also contend that in a letter dated February 11, 2016, the Contractor admitted to not completing component 2 of the contract, and therefore the ALJ erred in finding that this component was completed. Component 2 consists of the construction of a "190' Marsh Creation with Sill (living shoreline) on West side of property." *OAH Hearing Claimants' Exhibit 1; ALJ Recommended Decision* p. 5. The February 11, 2016 letter referenced by the Claimants, was admitted into evidence at the hearing before the ALJ as the Contractor's Exhibit 10. *OAH Hearing Transcript* p. 152-155. The letter was originally sent to the Commission as a response to the Claimants' original complaint. Based on the letter itself, as well as the testimony of the Contractor at the hearing before the ALJ, it is clear that the letter was written by the Contractor's son Jaime Insley. *OAH Hearing Contractor's Exhibit 10; OAH Hearing Transcript* p. 153. In the letter, the younger Insley states that "[t]he 190' sill, not a wall, is intact and holding up nicely last time I saw it; but the "living shoreline" aspect is not complete as is still needs some fill and plantings." *OAH Hearing Contractor's Exhibit 10*. Mr. Insley goes on to admit in the letter that component 2 was not fully completed by stating that "[p]er the contract, #1 #5 #6 have all been completed and #2 is approximately 90% complete as the stone sill is the main component and cost of that project and was completed." *OAH Hearing Contractor's Exhibit 10*. While the letter is authored by the Contractor's son, the Contractor did not dispute

the contents of the letter and in fact submitted it into evidence at the OAH hearing in support of his case. *OAH Hearing Transcript* p. 152-155. Although this letter was offered into evidence, the ALJ did not take into consideration the admission that component 2 was not entirely completed. The Commission therefore amends the ALJ's finding of fact that component 2 has been completed and modifies the calculation of actual loss to reflect the admission that only 90% of the component was completed.

The discounted price for component 2 is \$28,915.66 (\$30,000 – \$1,084.34). When this discounted price is reduced by 10% to reflect the remaining amount left to be completed, the result is \$26,024.09 (\$28,915.66 - \$2,891.57). This brings the ALJ's value of any materials or services provided by the Contractor from \$53,975.90 down to \$51,084.33 (Component 1 \$4,337.35 + Component 2 \$26,024.09 + Component 5 \$6,265.06 + Component 6 \$14,457.83). Therefore, the Commission recalculates the actual loss as follows:

\$65,000	Payments made to the Contractor by Claimants.
Less <u>\$51,084.33</u>	The value of materials or services provided by the Contractor.
\$13,915.67	Actual Loss

Other than the above-mentioned amendments to the ALJ's findings of fact and the subsequent recalculation of the actual loss in this case, the Commission affirms the decision of the ALJ.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 16th day of May 2018 **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED** as **AMENDED;**
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED** as **AMENDED;**

- C. That the Recommended Decision and Order of the Administrative Law Judge is **AFFIRMED as AMENDED; AND**
- D. That the Maryland Home Improvement Guaranty Fund award the Claimants **\$13,915.67.**
- E. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Robert Altieri
Chairperson -Panel
Maryland Home Improvement
Commission

IN THE MATTER OF THE CLAIM * BEFORE JOHN T. HENDERSON, JR.,
OF MATTHEW E. BRODAK AND * ADMINISTRATIVE LAW JUDGE
SOPHIE BRODAK-SONG, * THE MARYLAND OFFICE
CLAIMANTS¹, * OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND *
FOR THE ALLEGED ACTS OR *
OMISSIONS OF *
JAMES INSLEY, T/A *
THREE J CONSTRUCTION, LLC * OAH No.: DLR-HIC-02-17-02684
RESPONDENT * MHIC NO.: 16 (05) 899

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RECOMMENDED 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 September 7, 2016, Matthew E. Brodak (now, along with his wife, Sophie Brodak-Song, Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the reimbursement of \$68,600.00 of actual losses allegedly suffered

¹ The claim was amended at the hearing without objection for the purpose of adding the Claimant Wife, Sophie Brodak-Song, as Co-Claimant. I will refer to them both as the Claimants. When referring to Ms. Brodak-Song, I will refer to her as the Claimant Wife.

because of a home improvement contract with James Insley, t/a Three J Construction, LLC (Respondent).

I held a hearing on May 10, 2017, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(a) and (e) (2015). Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimants appeared and represented themselves. The Respondent appeared and represented himself.

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 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

ISSUES

1. Did the Claimants sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?
2. If so, how much are the Claimants entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted exhibits on behalf of the Claimants as follows:

- Cl. Ex. 1 Contract between the Claimants and the Respondent, dated August 18, 2014
- Cl. Ex. 2 General Tidal Wetlands License dated August 22, 2014; map of scope of work
- Cl. Ex. 3 Map of scope of work; Marsh Creation with Sill map
- Cl. Ex. 4 Emails from the Respondent to the Claimants dated August 6, 8, 11 and 12, 2014; September 18 and 24, 2014
- Cl. Ex. 5 Copies of check carbon for numbers 109, 525, 526, and 527; Bank of America Statement, ending December 18, 2014

- Cl. Ex. 6 Photographs A-W; copies of photographs i-iv
- Cl. Ex. 7 Independent Evaluation by Enrico Dimattia (Dimattia), dated August 26, 2016
- Cl. Ex. 8 Narrative written by the Claimant Wife

I admitted exhibits on behalf of the Respondent as follows:

- Resp. Ex. 1 Photograph of subject property
- Resp. Ex. 2 Photograph of subject property
- Resp. Ex. 3 Photograph of subject property taken December 2014
- Resp. Ex. 4 Photograph of subject property
- Resp. Ex. 5 Photograph of subject property
- Resp. Ex. 6 Check no. 525, dated August 18, 2014; check no. 109, dated December 2, 2014
- Resp. Ex. 7 Photograph of subject property, taken May 9, 2017
- Resp. Ex. 8 Photograph of subject property, taken December 2014
- Resp. Ex. 9 Photograph of subject property, taken December 2014
- Resp. Ex. 10 Written response of the Respondent to David R. Finneran of the MHIC, dated February 11, 2016
- Resp. Ex. 11 Summary of Response to Claimants' complaint to Michael Miller of the MHIC, dated October 25, 2016
- Resp. Ex. 12 Letter from Charles Poole, Superintendent of Parks, Wicomico County, Maryland, to: Whom it May Concern, dated May 9, 2017
- Resp. Ex. 13 2014 holiday card from the Claimants to the Respondent
- Resp. Ex. 14 Letter from the Respondent to the MHIC, dated May 8, 2017

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1 Notice of Hearing from the OAH, dated February 8, 2017
- GF Ex. 2 Notice of Hearing from the OAH, dated May 2, 2017
- GF Ex. 3 MHIC Hearing Order, dated January 20, 2017
- GF Ex. 4: The Respondent's DLLR license history, as of May 9, 2017

- GF Ex. 5: MHIC Home Improvement Claim Form, dated September 2, 2016
- GF Ex. 6 Letter from the MHIC to the Respondent, dated September 16, 2016
- GF Ex. 7 Two photographs of subject property

Testimony

Sophie Brodak-Song conducted the hearing and testified for the Claimants. The Respondent testified in his own behalf. The Fund did not present any 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 contractor's license number 4942444 and was trading as Three J Construction, LLC.
2. The Claimants are not related to the Respondent.
3. The Claimants' property subject to this matter is located at 20022 Nanticoke Road, Nanticoke, Maryland 21840 (the Property).
4. The Property is a vacation home used by the Claimants.²
5. The Claimants have not filed other claims against the Respondent outside of these proceedings.
6. On August 18, 2014, the Claimants and the Respondent entered into an agreement (the Contract) whereby the Claimants would pay the Respondent \$80,000.00 to construct a

² The Claimants' primary home is at 18803 Lindenhouse Road, Gaithersburg, Maryland 20879.

riprap³ shoreline barrier⁴ (the Barrier) along the Claimants' river shoreline. The Barrier was designed to aid in shoreline erosion prevention.

7. The scope of work agreed upon is summarized as follows:

1.	Construct a 10' x 20' Platform at the end of reconstructed pier.	\$ 4,500.00
2.	Construct 190' Marsh Creation with Sill (living shoreline) on West side of property.	\$30,000.00
3.	Construct 130' Marsh Creation with Sill (living shoreline) on North side of property.	\$19,500.00
4.	Install 60' of Marsh Edging (low profile stone revetment ⁵) on NW corner of property.	\$ 7,500.00
5.	Reset existing concrete bulkhead in addition, replenish using available existing concrete, along the driveway on South side of property.	\$ 6,500.00
6.	Remove concrete wall around area leading to pier, build up with stone and backfill.	\$15,000.00
	Total	\$83,000.00
	Less Discount	<u>-\$ 3,000.00</u>

8. The fee for the scope of work agreed upon pursuant to the Contract totaled \$80,000.00.

³ Riprap, rip rap, rip-rap, shot rock, rock armour, or rubble, is rock or other material used to armor shorelines, streambeds, bridge abutments, pilings and other shoreline structures against scour and water or ice erosion. It is made from a variety of rock types, commonly granite or limestone, and occasionally concrete rubble from building and paving demolition. It can be used on any waterway or water containment where there is potential for water erosion. <https://en.wikipedia.org/wiki/Riprap> (Last viewed July 27, 2017.)

⁴ According to the Respondent, the Barrier is also called the sill or the breakwater.

⁵ A revetment is a facing (as of stone or concrete) to sustain an embankment.

<https://mail.google.com/mail/u/0/#all?compose=15da9f318b8e8ec0>. (Last viewed, August 3, 2017.)

9. The payment terms required a twenty-five percent initial deposit, a twenty-five percent payment upon starting the work, a twenty-five percent payment when the project was one-half complete, and the balance paid upon completion of the project.

10. On August 18, 2014, the Claimants paid a deposit of \$10,000.00 with their check number 525.

11. On August 22, 2014, the MDE issued to the Respondent the General Tidal Wetlands License authorizing the construction of the Barrier.

12. In November 2014, the Respondent advised the Claimants that he received the MDE permit to begin work on the project, despite the permit being issued on August 22, 2014.

13. On November 16, 2014, the Claimants paid the Respondent \$10,000.00 with check number 526.

14. On December 2, 2014, the Claimants met with the Respondent who asked for an additional \$30,000.00 to continue the work. The Claimants paid the \$30,000.00 with check number 109, when the Respondent agreed to construct a jet ski lift. After the check bounced, the Claimants replaced it on December 10, 2014.

15. On January 25, 2015, the Claimants paid the Respondent \$15,000.00 with check number 527.

16. The Claimants made the following payments to the Respondent:

No. 525	August 18, 2014	\$10,000.00	
No. 526	November 16, 2014	\$10,000.00	
No. 109	December 2, 2014	<\$30,000.00>	Bounced
No. 109 Duplicate No.	December 10, 2014	\$30,000.00	To replace December 2, 2014 bounced check
No. 527	January 25, 2015	<u>\$15,000.00</u>	
	Total Paid	\$65,000.00	

17. The Respondent did no work the rest of January 2015, the remainder of winter and through the spring of 2015.
18. The Claimants and the Respondent met face to face at the Property in August 2015.
19. The Claimants had no further meetings with the Respondent after August 2015.
20. In September 2015, the Respondent completed the construction of the last section of the pier.
21. The Respondent completed all of the scope of work pursuant to the Contract except for the following components:
 3. Construct 130' Marsh Creation with Sill (living shoreline) on North side of property. \$19,500.00
 4. Install 60' of Marsh Edging (low profile stone revetment) on NW corner of property. \$ 7,500.00
22. The Respondent did not complete components three and four because the Claimants did not pay him the balance due under the Contract.
23. The Claimants did not contract with another contractor to complete the project.

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 reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015).⁶ Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain

⁶ Unless otherwise indicated, all references are to the 2015 version.

losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). 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). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full, with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411(a).

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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses 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 proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and 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 (3d ed. 2000).

There is no dispute that the Respondent held a valid contractor's license in 2014 when he entered into the Contract with the Claimants. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimants are the owners of the subject property and that there is no procedural impediment barring them from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement due to misconduct, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimants unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimants have proven eligibility for compensation and have not unreasonably rejected good faith efforts by the Respondent to resolve the claim.

On August 18, 2014, the Respondent agreed to construct the Barrier for the Claimants upon their shoreline along the mouth of the Tangier Sound on the Nanticoke River. The Claimants allege that the Barrier was constructed poorly. The Claimant Wife testified that after the Respondent began construction of the project, large stones kept falling from the shoreline into the water and sink holes developed along the shore line near the constructed pier. Out of the six components in the Contract, the Respondent did not construct adequately components two (the 190' barrier on the north side of the property) and six (removal of the concrete wall); and he did not construct components three (a 130' barrier on the north side) and four (a 60' barrier on the NW corner of the property), she alleged. She testified that the Barrier as constructed by the Respondent did not prevent erosion of her shoreline and it allowed river water to encroach toward her home, potentially causing water damage to the home.⁷

⁷ According to the testimony of the Claimant Wife, the house on the property was vacant and not used by the Claimants. It has since been torn down.

In addition, the Claimant Wife testified she did not see a required filter-cloth placed underneath the Barrier and their independent evaluator, Dimattia, wrote in his evaluation that he did not see evidence of filter cloth laid under the Barrier constructed by the Respondent. The Claimant Wife was sure there was no filter cloth placement because she did not see edges of the filter cloth flapping against the water. She also testified that there should be no loss of sand from under the Barrier after it had been backfilled along the shoreline. She stated that the lack of a filter cloth allows the loss of sand from the shoreline.

The Claimants believe that gaps, sink holes and lack of filter cloth placement will cause continued erosion of their shoreline. However, I find they have not provided credible evidence to show the Respondent did not lay filter cloth under the constructed length of the Barrier. In addition, despite Dimattia's evaluation, there is no credible evidence presented to show that the absence of filter cloth underneath a breakwater barrier would render useless the barrier's function in slowing down the effects of shoreline erosion. Although the Claimants received Dimattia's evaluation, they did not ask him to complete the work nor have they contracted with any other contractor to complete the work.

The Claimant Wife testified that the Respondent abandoned the work in September 2015, which, according to her, was the last time the Respondent was on the Property. Finally, she said the Respondent did not construct the Barrier at 190' as agreed upon, but only constructed it at 150' in length on the west side of the property. However, the Claimants did not present any credible evidence to show the actual measurements of the Barrier constructed by the Respondent. Although I found the Claimant Wife's testimony and demeanor demonstrated an effort to be correct in her perceptions, the Respondent, due to his experience, was better able to explain the nature and function of the Barrier.

The Respondent testified that he constructed the barrier at 190' on the west side of the property as component two of the Contract required. He further testified that he laid the filter cloth along the full length of the breakwater barrier. I did see in the photographs admitted into evidence (Cl. Ex. 6L, 6O, and 6R; Resp. Ex. 4 and 8) what looks like filter cloth laid under the boulders. The Respondent further testified that he cannot provide a one hundred percent guarantee that the shoreline will not experience some erosion because of the ebb and flow of river water and the blowing of wind. According to the Respondent, the Barrier's purpose is to reduce the energy of the water waves so plant life will take hold and shoreline erosion will be minimized. The Respondent testified that the Barrier requires regular routine maintenance, including filling holes due to the loss of ground material such as sand due to the effects of the water and wind.

The Respondent testified he did not complete components three and four because the Claimants told him they were not going to pay any more money to him for work. He did have experience with them bouncing the \$30,000.00 check. Although the \$30,000.00 was replaced on December 10, 2014, the Respondent did not have a good reason to believe the Claimants would honor any future financial commitments.

The Respondent further testified that he would have completed components three and four, however the Claimant Wife wanted to relocate the barriers identified in those components. According to the Respondent, the County would not provide him with a license to build a barrier along the newly suggested areas.

I find that the Respondent's offer to complete components three and four once he was paid for the value of that work was reasonably rejected by the Claimants. Although the Claimants changed their minds about the location of the barriers in components three and four and they made an unsuccessful effort to renegotiate the location, the Respondent's months of

inactivity (January through August of 2015) raised a legitimate concern that the project would not be completed by the Respondent. Each party, at that point, had a mutual reluctance to continue doing business with each other.

The Fund argued that the credible evidence shows components one, two and five were done satisfactorily and the project was \$15,000.00 away from completion. It said that since components three and four were not constructed by the Respondent, the Claimants are eligible for compensation from the Fund. The Fund further argued that the Barrier required, according to the testimony of the Respondent, routine maintenance to fill sink holes when needed because river water will always encroach, pulling some sand, dirt, and debris back into the river. The Fund asserted that the credible evidence shows that the Respondent performed a perfectly adequate job on the project overall, that there was no credible evidence the Respondent did not construct the full footage of the Barrier as the Contract required, and there was no credible evidence that filter cloth was not laid.

I do find that pursuant to not constructing components three and four of the Contract, the Respondent did not complete the home improvement work for which he was contracted. Thus, the misconduct in this case lies in his not performing the agreed upon work rather than in performing in an unworkmanlike manner.

A preponderance of the evidence shows that the Claimants wanted construction under components three and four at new locations. The evidence also shows that the parties could not agree upon the modifications due to County ordinance requirements and the Claimants not agreeing to pay the Respondent for the balance due under the Contract. I find that when the Respondent offered to complete components three and four if he were paid up front, it was not unreasonable under those circumstances for the Claimants to deny his offer.

The Claimants sustained an actual monetary loss. They are eligible for compensation from the Fund. I now turn to the amount of the award, if any.

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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss." According to the Fund, and I agree, the appropriate formula is the following:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

(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.

Pursuant to the Contract, the Respondent performed components one (\$4,500.00), two (\$30,000.00), five (\$6,500.00), and six (\$15,000.00). Therefore, the value of the material and services provided by the contractor totals \$56,000.00.⁸ Using the formula in COMAR 09.08.03.03B(3)(b), the following calculations apply:

\$65,000.00	Payments made to the Respondent by Claimants
Less <u>\$56,000.00</u>	The value of materials or services provided by the Respondent/contractor pursuant to scope of work components one (\$4,500.00), two (\$30,000.00), five (\$6,500.00) and six (\$15,000.00)
<hr/>	
\$ 9,000.00	Actual Loss

The Claimant has an "actual loss" of \$9,000.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a).

⁸ I have not considered utilizing any costs provided by Dimattia since the Claimants did not use his services or use any services from another contractor who utilized the same or similar costs to complete the work.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual loss of \$9,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) (2015); COMAR 09.08.03.03B(3)(b).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Claimants sustained an actual loss; and

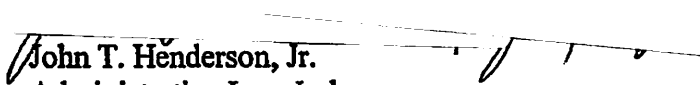
ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$9,000.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission;⁹ and

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

Signature on File

August 7, 2017
Date Issued


John T. Henderson, Jr.
Administrative Law Judge

JTH/emh
#169306

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 12th day of September, 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.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION