

IN THE MATTER
OF THE
PETITION OF GENE HAYNES

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IN THE
CIRCUIT COURT
FOR BALTIMORE CITY
Case No.: 24-C-17-003344

* * * * *

ORDER

The Petition for Judicial Review having come before the court, and a hearing having been held on March 9, 2018, and the court having considered the arguments of the parties, it is, this 9th day of March, 2018, for the reasons stated on the record

ORDERED that the Decision of the Maryland Home Improvement Commission (Administrative Law Judge) in Claim No. 16 (05) 979, OAH No. DLR-HIC-02-16-25110, is **AFFIRMED**, costs to be paid by Petitioner.

W. Michel Pierson
Judge's Signature Appears
On Original Document

Judge W. Michel Pierson

TRUE COPY
TEST

Maureen Benader



APR 11 2018

**IN THE MATTER OF THE CLAIM OF
TYREKIA JACKSON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GENE HAYNES,
T/A HAYNES CONSTRUCTION
RENOVATIONS/BUILDERS, INC.,
RESPONDENT**

*** BEFORE TAMEIKA LUNN-EXINOR,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-16-25110
* MHIC No.: 16 (05) 979
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 9, 2016, Tyrekia Jackson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$47,130.04 in alleged actual losses suffered as a result of a home improvement contract with Gene Haynes, trading as Haynes Construction Renovations/Builders, Inc. (Respondent).

I held a hearing on January 9, 2017 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland 21030. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. The Respondent represented himself. Hope Sachs,

Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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 09.08.02.01B; 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:

- | | |
|----------------|--|
| Claimant Ex. 1 | Contract, 8/19/15 |
| Claimant Ex. 2 | Department of Housing and Community Development, Division of Construction and Building Inspection, Permit No. COM2015-19416, 8/21/15 |
| Claimant Ex. 3 | Department of Housing and Community Development, Division of Construction and Building Inspection, Permit No. COM2015-22265, 9/22/15 |
| Claimant Ex. 4 | Department of Housing and Community Development, Division of Construction and Building Inspection, Permit No. COM2015-22289, 9/22/15 |
| Claimant Ex. 5 | Permit Nos. 19416, 22265 and 22289 |
| Claimant Ex. 6 | Proposed Floor Plan, Basement & First Floor, 8/2015 |
| Claimant Ex. 7 | Proposed Floors Plan, Second Floor, 8/2015 |
| Claimant Ex. 8 | Checks from Claimant to Respondent: <ul style="list-style-type: none">• \$3,500.00, 8/15/15• \$19,833.00, 8/19/15• \$19,833.00, 9/11/15• \$9,833.00, 11/13/15• \$5,000.00, 12/1/15 |

- Claimant Ex. 9 Power Home – Custom Remodeling and Improvement Agreement, 4/19/16 with the following attachments:
- Sears Receipt, 3/7/16
 - Granite MR Contract, 12/20/15
 - Home Depot Receipts, 12/17/15 and 12/21/16
 - Lowe’s Receipts, 12/17/15 and 12/18/15
 - Walter Electric, Proposal, 9/1/16
 - Check from Claimant to Walter Electric in the amount of \$372.00, 9/6/16
 - Check from Claimant to Walter Electric in the amount of \$743.00, 9/21/16
- Claimant Ex. 10 Various Photos of Claimant’s Property (a – k)
- Claimant Ex. 11 Chance Development, LLC, Proposal, 10/26/16
- Claimant Ex. 12 Comfort Masters Heating & Cooling, Inc., Proposal, 11/3/16
- Claimant Ex. 13 Charm City Home Inspection Services – Contract Obligation Overview and Repair Report for Claimant’s Property, 4/29/16

I admitted the following exhibit on behalf of the Respondent:

- Respondent Ex. 1 Letter from Respondent to Claimant, 5/2/16

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, 9/30/16
- Fund Ex. 2 MHIC Occupations/Professional License History and Inquiry for Gene Calvin Haynes, printed 1/5/17
- Fund Ex. 3 MHIC Claim Form, signed 5/2/16

Testimony

The Claimant’s husband, Jeryl Cole, Sr., testified. The Claimant also presented the testimony of Dustin Zellmer, President, Charm City Home Inspection Services, Inc.

The Respondent testified on his own behalf.

The Fund did not call 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 licensed by the MHIC as a home improvement contractor. (GF Ex. 2.)

2. In 2015, the Claimant purchased a home located on North Belnord Avenue in Baltimore, Maryland. The Claimant purchased the “fixer upper” with the intention of having major renovations done on the property. (Test. of Cole and Respondent.)

3. On August 19, 2015, the Claimant and the Respondent entered into a contract to repair and renovate her home. The project included the following scope of work:

Exterior

- Replace front and rear entrance doors (with storm doors to be included)
- Replace and repair door transit to accommodate full size doors
- Replace exterior windows as needed
- Repaint exterior, existing brick face to remain
- Rear yard to be cleaned and made accessible
- Code-approved railing shall apply to all steps
- Ensure roof is up to code and certified

Interior (1st Floor)

- Demo right face upper and lower walls to expose brick face
- Demo and relocate main staircase to right side wall
- Demo kitchen per plan
- Install new cabinets, counters, island per plan (see owner sketch)
- Fabricate half bath 1st floor
- Laminate grade (2) 1st floor
- Install 3-1/2 inch crown molding 1st level
- Paint 1st level per owner color

Interior (2nd Floor)

- Demo second floor as needed per plan
- Fabricate four fixture bath
- Replace doors/locks
- Laminate grade 2 floor throughout 2nd floor (excluding bathroom)
- Paint 2nd level per owner color

Basement

- Excavate basement slab
- Remove roots and re-pour

- Fabricate laundry and mechanical room
- Install new stair stringer

Mechanical

- Install central heat and air

Electrical

- Upgrade electrical systems
- Install recess lighting
- Install GFIS switches
- Outlets per code and plan

Plumbing

- Install new plumbing
- Install new riser
- New water heater
- Ensure plumbing up to code

Appliances Purchase and Installation

- Stainless Steel Refrigerator
- Stove
- Microwave Oven
- Dishwasher

(Cl. Ex. 1.)

4. The estimated price to complete the scope of work was \$63,000.000. The

breakdown was as follows:

- | | |
|----------------------------------|----------|
| • Drawing Plan/Permits | \$ 3,500 |
| • Electrical | \$ 7,500 |
| • Plumbing | \$ 7,000 |
| • Mechanical/HVAC | \$ 7,000 |
| • Excavation (Concrete Slab) | \$13,000 |
| • 1 st Floor interior | \$15,000 |

Total Cost \$63,000

(Id.)

5. The agreed-upon contract price was \$63,000. The project began in August 2015 and was supposed to be completed in eight weeks. (Cl. Ex. 1 and Test. of Cole.)

6. The Claimant's fiancé at the time of the contract, Jeryl Cole, Sr., and the Respondent had a familial relationship. The Respondent is the father of one of Mr. Cole's cousins. (Test. of Cole and Respondent.)

7. Mr. Jeryl Cole, Sr. is not a party to the contract between the Claimant and the Respondent. The Claimant and Mr. Cole were married on July 28, 2016. (Test. of Cole.)

8. The Respondent was paid a total of \$57,999. The payment schedule was as follows:

• August 15, 2015	-	\$ 3,500
• August 19, 2015	-	\$19,833
• September 11, 2015	-	\$19,833
• November 13, 2015	-	\$ 9,833
• December 4, 2015	-	\$ 5,000
Total Paid to Respondent	-	\$57,999

(Cl. Ex. 8.)

9. In August and September 2015, the Respondent obtained permits to work on the Claimant's home. (Cl. Ex. 2-5.)

10. The Respondent began the work as agreed but did not complete the entire scope of work. The following items under the contract were not completed:

Exterior

- Replace front and rear entrance doors (with storm doors to be included) – no storm doors were provided
- Replace exterior windows as needed
- Repaint exterior, existing brick face to remain
- Rear yard to be cleaned and made accessible

Interior (1st floor)

- Fabricate half bath 1st floor
- Install 3 ½ inch crown molding 1st level

Basement

- Excavate basement slab
- Remove roots and re-pour
- Fabricate laundry and mechanical room
- Install new stair stringer

Mechanical

- Install central heat and air – no central air was provided

Electrical

- Upgrade electrical systems

Appliances Purchase and Installation

- Stainless Steel Refrigerator
- Stove
- Microwave Oven
- Dishwasher

(Test. of Cole and Zellmer.)

11. In December 2015, the Respondent stopped working in the Claimant's home and told the Claimant to keep the contract balance of \$5,000 to complete the remaining work. (Test. of Cole and Respondent.)

12. The Claimant and Jeryl Cole made numerous attempts to contact the Respondent about completing the work in the home but were unsuccessful. (Test. of Cole.)

13. On April 29, 2016, the Claimant hired a home inspector, Dustin Zellmer, to review the Respondent's contract and inspect the work performed and not completed by the

Respondent. Mr. Zellmer estimated that the cost to complete the work was \$35,000 to \$40,000.

(Cl. Ex. 13.)

14. From December 2015 to April 2016, the Claimant paid a total of \$14,072.79 to complete the following items that were within the Respondent's scope of work:

• Appliances for Kitchen	\$1,973.87
• Granite Countertops	\$2,050.00
• Bathroom and Kitchen Fixtures	\$2,127.26
• Paint	\$ 78.95
• Electrical Upgrades	\$1,115.00
• Replacement Windows	\$6,727.71

Total: \$14,072.79

(Cl. Ex. 9.)

15. As of the date of the hearing, the following work was not completed by the Respondent or the Claimant:

Exterior

- Rear yard to be cleaned and made accessible

Interior (1st floor)

- Install 3 ½ inch crown molding 1st level

Basement

- Excavate basement slab
- Remove roots and re-pour
- Fabricate laundry and mechanical room
- Install new stair stringer

Mechanical

- Install central heat and air – no central air was provided

(Test. of Cole and Zellmer.)

16. On October 26, 2016, the Claimant received an estimate from Chance Development, LLC to complete her basement repair, new parking pad, and new deck and stairs for \$26,825.00. The only portion of this contract that was within the Respondent's scope of work was the basement work which totaled \$18,600.00. (Cl. Ex. 11.)

17. On November 3, 2016, the Claimant received an estimate from Comfort Masters Heating & Cooling, Inc. for installation of a central air conditioning unit which totaled \$4,000.00. (Cl. Ex. 12.)

18. The Claimant's actual loss is \$31,671.79.

19. The Claimant's actual compensable loss is \$20,000.¹

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her 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 (3rd. ed. 2000).

¹ Md. Code Ann. Bus. Reg. §8-405(e) states as follows:

(e) The Commission may not award from the Fund:

- (1) more than \$20,000 to one claimant for acts or omissions of one contractor;
- (2) more than \$100,000 to all claimants for acts or omissions of one contractor unless, after the Commission has paid out \$100,000 on account of acts or omissions of the contractor, the contractor reimburses \$100,000 to the Fund;
- (3) an amount for attorney fees, consequential damages, court costs, interest, personal injury damages, or punitive damages;
- (4) an amount as a result of a default judgment in court; or
- (5) an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.

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) (2015);² *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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant presented a viable claim against the Respondent. She had a valid contract with the Respondent, copies of her cancelled checks paid to the Respondent, copies of the Respondent’s building permits for her property, a floor plan for the renovation, receipts for the Claimant’s out of pocket expenses for repairs after the job was abandoned, and photographs of the abandoned repair project.

The Claimant’s witness, Jeryl Cole, Sr., was credible with regard to his testimony about the repair work performed by the Respondent. However, I found Mr. Cole to be rather vague and deceptive when testifying about his familial relationship with the Respondent.³ His demeanor changed from calm, deliberate and focused when speaking about the contract work to argumentative and evasive when asked about his familial relationship with the Respondent. The fact is that Mr. Cole and the Respondent have a family connection. The Respondent is the father of one of Mr. Cole’s cousins. However, this information has no bearing on my decision in this

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

³ Md. Code Ann. Bus. Reg. §8-405(f) lists the following excluded claimants

(f) Excluded claimants. --

(1) A claim against the Fund based on the act or omission of a particular contractor may not be made by:

(i) a spouse or other immediate relative of the contractor;
(ii) an employee, officer, or partner of the contractor; or
(iii) an immediate relative of an employee, officer, or partner of the contractor.

matter since Mr. Cole was not a party to the contract between the Claimant and the Respondent. The Claimant and Mr. Cole were engaged to be married at the time of the contract was signed on August 19, 2015. They were married July 28, 2016. The Claimant was not an immediate relative of the Respondent at the time the contract was executed or throughout the pendency of the contracted work.

Mr. Cole testified that he handled the negotiations with the Respondent for the contract signed by the Claimant on August 19, 2015. According to him, the scope of work in the contract was started by the Respondent but not completed. (Cl. Ex. 1.) Mr. Cole also testified that the Respondent received permits from Baltimore City to perform the work in the Claimant's home, but the permits were incorrect. He stated that there was a permit for remodeling 300 square feet, when the home is actually 912 square feet. He also noted that there was a permit for an electrical upgrade that was never performed by the Respondent. (Cl. Ex. 2 – 5.) Additionally, there was also a floor plan for the property, and the Respondent did not follow the floorplan for the basement at all. (Cl. Ex. 6 and 7.) Mr. Cole testified that the Respondent failed to complete the work as contracted. (See Finding of Fact #10.) The largest incomplete area was the basement which was supposed to be excavated, roots removed, and concrete re-poured, with a fabricated laundry room and mechanical room and the installation of new stairs. Mr. Cole testified that the Claimant paid the Respondent a total of \$58,000.00 on the \$63,000.00 contract.⁴ He stated that the Respondent told him and the Claimant to keep the \$5,000.00 balance on the contract to complete the remaining items in the property.

Mr. Cole testified that in January 2017, in preparation for this hearing, he took photos of the property. The photos were presented as evidence of the incomplete work performed by the

⁴ The actual amount of money paid to the Respondent based on the Claimant's cancelled checks was \$57,999.00 (Cl. Ex. 8).

Respondent. The photos clearly show exposed electrical wiring in the kitchen (Cl. Ex. 10a), two incomplete window repairs (Cl. Ex. 10b, c, and i), dirty backyard (Cl. Ex. 10d), a water heater installed in the wrong location (Cl. Ex. 10e), basement stairs held up by a 2 by 4 (Cl. Ex. 10f&h), construction debris and a pile of dirt in the basement (Cl. Ex. 10g, i), and exposed basement ceiling (Cl. Ex. 10j, k). On cross-examination, the Respondent presented a letter addressed to the Claimant dated May 2, 2016 in which the Respondent asked the Claimant to contact Horton Heating and Plumbing to arrange a time for installation of her outside cooling unit. The letter indicates that the cooling unit was not within the scope of the contract. Mr. Cole testified that neither he nor the Claimant received this letter, and he also stated that the air conditioning unit was included in the contract and was not provided by the Respondent.

The Claimant also presented the testimony of Dustin Zellmer, President of Charm City Home Inspection Services, LLC. Mr. Zellmer testified that he was hired by the Claimant to do a walk through visual inspection of her property to determine work that was not completed under the contract and to give an estimate for the completion of the work. Mr. Zellmer testified that he went to the Claimant's home on April 29, 2016 and noticed the following incomplete work on the 2nd floor: missing windows and electrical work. On the 1st floor he noticed the following deficiencies: no ½ bath; no crown molding; there were appliances and a countertop installed in the kitchen that the Claimant purchased; painting was incomplete; no windows; and, electrical issues. As for the basement, he noticed the following: the stairs were not properly attached and the rise was incorrect; no excavation; HVAC was not completed; plumbing was incomplete; no slab raise; no basement windows; pile of dirt in the basement; and, water damage in the basement. Mr. Zellmer also testified that the electrical panel was not upgraded and the floor plan for the basement was not followed by the Respondent. (Cl. Ex. 13.)

On cross-examination, Mr. Zellmer admitted that he was not a home improvement, plumbing, or electrical contractor. He stated that he is a home inspector. He also admitted that he was paid by the Claimant to testify in this case. When asked what he estimated the cost would be to finish the incomplete work from the contract, he stated between \$35,000.00 and \$40,000.00. I found the testimony of Mr. Zellmer to be credible. He provided the Claimant with an extensive report of his findings which is heavily supported by other witness testimony and the photos.

The Claimant also presented the testimony of Sean Smith, a former employee of the Respondent. Mr. Smith stated that he was with the Respondent at the Claimant's home during the contract discussions. He recalled the Respondent telling the Claimant that the work on her home would be completed in eight weeks. On cross-examination, Mr. Smith was asked when the work at the home began and ended; he was unable to answer that question. Mr. Smith also admitted on cross-examination that he only worked for the Respondent for two or three months and that he did not perform any work at the Claimant's home. The testimony of Mr. Smith was limited and lacked any valuable information that would assist me in rendering a decision in this matter.

The Respondent testified that the Claimant bought a fixer upper and he gave her an initial verbal estimate of \$75,000.00 to complete the work she wanted done in the home. The Respondent testified that he decreased the estimate because the Claimant agreed to do some of the work herself to save money. The final contracted amount was \$63,000.00. The Respondent testified that the Claimant changed some of the items listed in the original contract. The Claimant requested exposed brick, wine racks, a designer ceiling and a small porch in the backyard instead of excavation of the basement. According to the Respondent, he communicated mostly with Mr.

Cole when suddenly the communication stopped and he was no longer given access to the property. The Respondent testified that all of the work he performed was approved by the Claimant.

On cross-examination, the Respondent testified that he received text messages and voicemail messages from the Claimant and Mr. Cole through December 2015. At this time, the CEO of the company left. The Respondent testified that he completed all of the work that he and the Claimant verbally agreed to; however, there was no written confirmation, such as a change order, of the Claimant's requested alterations to the contract. The Respondent was adamant that the Claimant exchanged the excavation of the basement for a back porch, designer ceiling, wine racks, exposed brick wall, custom painting and ceramic tile. As for the pictures presented by the Claimant, the Respondent testified that the pictures show items that were verbally removed from the contract by the Claimant. He admitted that the Claimant paid him \$58,000.00 and that there was \$5,000.00 that he let the Claimant keep to finish the work. The Respondent's presentation at the hearing was inconsistent. He had no proof that the Claimant requested any changes to his original scope of work, other than his testimony. The Respondent's demeanor during his opening statement and cross-examination of witnesses was direct, his tone of voice had various levels of inflection, he made eye contact with all parties and me; however when he took the witness stand to testify in his case in chief, he avoided making eye contact with anyone in hearing room and his voice became very monotone. It was obvious that he was nervous, but the change in his demeanor was so drastic that I noticed it immediately. I do not find the testimony of the Respondent to be credible based on his lack of supporting evidence and his overall demeanor throughout the hearing.

The evidence clearly shows that the Respondent failed to complete the scope of work for the Claimant's home renovation. Thus, I find that the Claimant is eligible for compensation from the Fund based on an incomplete home improvement.

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 this formula, actual loss is calculated by adding the amount paid to the Respondent under the contract to the amount paid by the Claimant to complete the contract, and deducting the original contract price, as shown here:

Amount paid to the Respondent	\$57,999.00
Plus amount Claimant paid out of pocket	\$14,072.79
Plus amount of Chance Development estimate	\$18,600.00
Plus amount of Comfort estimate	\$ 4,000.00
Equals subtotal	\$94,617.79
Minus contract price	<u>\$63,000.00</u>
Equals actual loss	\$31,671.79

PROPOSED ORDER

WHEREFORE, this 1st day of May, 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