

**IN THE MATTER OF THE CLAIM
OF DAVID ROSS,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GEORGE EKWUNO, T/A
THE NOBLE HOUSE LLC,
RESPONDENT**

*** BEFORE JENNIFER M. CARTER JONES,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-19-08670
* MHIC No.: 18 (90) 1033
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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On June 12, 2018, the Maryland Home Improvement Commission (MHIC) received a claim filed by David Ross (Claimant) seeking reimbursement from the MHIC Guaranty Fund (Fund) for \$2,396.00 in actual losses allegedly sustained as a result of the acts or omissions of home improvement contractor George Ekwuno, trading as The Noble House LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On March 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ Unless otherwise indicated, all citations to the Business Regulation article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

I held a hearing on June 17, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor (Department),² represented the Fund. Neither the Respondent, nor anyone authorized to represent him, appeared for the hearing. I waited fifteen minutes past the scheduled hearing time and then proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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. 2018); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered the following exhibits, which I admitted into evidence:

- Cl. 1 - Copy of personal check for \$2,396.00 from the Claimant to the Respondent, dated February 13, 2018; negotiated on February 15, 2018
- Cl. 2 - Photographs, taken between February and April 2018:
 - 2a: Respondent or Respondent's worker placing an electric fireplace in a wall opening
 - 2b: Pile of wood

² At the time of the hearing, the Department was known as the Department of Labor, Licensing, and Regulation.

2c: Brick structure at the back of the property and an individual poking the brick structure with an instrument

2d: Fireplace opening covered by plastic

- Cl. 3 - Online Review of the Respondent, dated June 2, 2016
- Cl. 4 - History of complaints against the Respondent filed with the MHIC between 1997 and 2018

The Respondent did not submit any exhibits for inclusion in the evidentiary record.

The Fund offered the following exhibits, which I admitted into evidence:

- GF 1 - OAH Notice of Hearing, dated April 23, 2019
- GF 2 - Memorandum from the OAH to MHIC Legal Services, dated June 4, 2019; copy of the OAH Notice of Hearing (see GF 1), MHIC Hearing Order, dated March 15, 2019, and attached documents; mailed to the Respondent by certified mail and returned to the OAH by the United States Postal Service (USPS) as unclaimed
- GF 3 - MHIC Licensing History for the Respondent, dated May 28, 2019
- GF 4 - MHIC Hearing Order, dated March 15, 2019
- GF 5 - Copy of the Claimant's Home Improvement Claim Form, dated June 6, 2018 and received by the MHIC on June 12, 2018
- GF 6 - Letter from the MHIC to the Respondent, dated June 12, 2018
- GF 7 - Emails between the Respondent and the Claimant, for dates including February 8, 2018 through March 7, 2018
- GF 8 - Emails between the Respondent, the Claimant, and Joe Ganzelli, the Claimant's tenant, dated March 15, 2018
- GF 9 - USAA insurance estimate, dated May 21, 2018
- GF 10 - Photograph of pellet stove, taken in or about February 2018
- GF 11 - Text messages between the Claimant and Mr. Ganzelli, undated

Testimony

The Claimant testified and presented testimony of the following witnesses:

- Frederick Johnson, Contractor
- Joseph Ganzelli, Claimant's tenant
- Monique Tober, Claimant's wife
- Kevin Niebuhr, MHIC Investigator

The Respondent was not present to offer any witness testimony.

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 relevant times, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-71494 and 05-132001.
2. At all relevant times, the Claimant owned a home on Angel Fish Court (the Property), in Waldorf, Maryland. He owns no other real estate in Maryland.
3. The Claimant is in the military. He currently lives in Chula Vista, California.
4. At all relevant times, Joe Ganzelli, a tenant, lived in the Property.
5. In or about February 2018, the Claimant entered into a contract with the Respondent, by text message, for the Respondent to remove an existing pellet stove in the Property living room, and replace it with an electric fireplace.
6. In order to complete the project, in addition to removing the pellet stove, the Respondent was to also remove an existing brick structure that formed part of the stove. The structure was constructed at the back of the house, atop an existing wood deck. The brick structure was covered with wood the same color as the deck. The Respondent was also to apply

siding to the back outer wall of the Property and paint the deck from the area where the brick structure was removed.

7. As part of the Contract, the Respondent agreed to remove any debris.
8. The Respondent agreed to complete the work within two weeks.
9. The agreed-upon cost for the materials and labor was \$2,396.00. On February 13, 2018, the Claimant paid the Respondent that amount by check.
10. The Claimant picked out an electric fireplace online. The Respondent advised the Claimant he had measured the fireplace opening and the electric fireplace the Claimant selected would fit perfectly.
11. The Respondent advised the Claimant he would purchase the electric fireplace the Claimant selected from Home Depot for \$330.00, including tax.³
12. On February 15, 2018, the Respondent notified the Claimant he and/or his crew had completed the first phase of removing the pellet stove. The Respondent advised the Claimant he had removed mold and applied an anti-microbial product.
13. The Respondent did not communicate with the Claimant between February 15 and February 27, 2018. The Claimant advised the Respondent he expected the Respondent to complete the project by February 29, 2018.
14. Before March 15, 2018, the Respondent removed the pellet stove and the electrical components that powered the pellet stove.
15. The Respondent also removed the brick structure on the back deck that formed part of the pellet stove and the wood surrounding that brick structure.
16. The Respondent left the wood and bricks he removed at the back of the house on the back deck.

³ The \$330.00 was included in the Contract price of \$2,396.00

17. After the Respondent removed the pellet stove and the brick structure, there was a hole in the wall that ran from the back deck to the living room where the pellet stove used to be.

18. The Respondent placed a wooden plank in the hole between the back deck and the living room and covered the openings to the hole with plastic.

19. After the Respondent removed the brick structure from the back of the house, the portion of the deck where the brick structure formerly stood was a different color from the rest of the deck.

20. The Respondent told the Claimant and the Claimant's tenants he would install the fireplace on March 15, 2018. The Respondent's tenants made themselves available on March 15, but the Respondent did not appear or install the fireplace.

21. The Claimant filed an insurance claim with United Services Automobile Association (USAA). USAA granted the claim for \$4,348.09 to install siding on the portion of the house where the brick structure once stood, to wash and paint the deck and to remove the debris.

22. The Claimant owed a \$500.00 insurance deductible toward the completion of the back siding, deck and debris removal. Therefore, the Claimant received \$3,848.09 from USAA.

23. The Claimant hired and paid a contractor, Mr. Handyman, to install siding on the portion of the house where the brick structure once stood and the surrounding area.

24. The Claimant also paid Mr. Handyman to install the electric fireplace and to remove the bricks and wood that remained on the property after the Respondent had removed the brick structure and the surrounding wood.

25. The Claimant paid Mr. Handyman with the insurance funds provided by USAA in the following amounts:

- \$300.00 on June 15, 2018
- \$715.04 on June 28, 2018
- \$374.19 on July 14, 2018
- \$214.70 on July 25, 2018

26. The total amount the Claimant paid Mr. Handyman was \$1,603.93.

27. The Claimant also bought an electric fireplace from Amazon at a cost of \$245.79.

28. The Respondent did not hire a contractor to wash and paint the deck.

29. The Claimant's tenant painted the portion of the deck where the brick structure once stood and the Claimant paid the tenant \$50.00 for the painting materials. The Claimant did not pay the tenant for the cost of labor to paint the deck.

30. The total amount the Claimant spent to complete the Respondent's unfinished work, including Mr. Handyman's work, the purchase of the electric fireplace, and the Claimant's tenant's work was \$1,899.72.

31. The Respondent did not return any of the funds provided from USAA to complete the deck work and siding installation.

32. The Claimant is entitled to reimbursement from the Fund in the amount of \$447.63.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to "the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d). These same

notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

The MHIC's business address of record for the Respondent is 9000 Green Run Way, Gaithersburg, Maryland, 20879. (GF Ex. 3) On April 23, 2019, the OAH sent the Respondent a Notice of Hearing (Notice), advising that the hearing was scheduled for 9:30 a.m. on June 17, 2019, at the OAH's office in Hunt Valley, Maryland. The Notice was sent to the Respondent at his address of record by both first-class and certified mail. On June 4, 2019, the certified mailing was returned to the OAH marked "unclaimed." The first-class mailing was not returned by the postal service as undeliverable.

The Respondent is obligated to keep the MHIC apprised of his current address. *See* Md. Code Ann., Bus. Reg. § 8-309 (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent by first-class and certified mailing using the MHIC's last known home and business addresses for the Respondent. The method of notice to the Respondent was reasonably calculated to provide him with notice of the hearing and I concluded that the Respondent received proper notice of the hearing. Md. Code Ann., Bus. Reg. §§ 8-312(d), 8-407(a); Md. Code Ann., State Gov't § 10-209 (2014); *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015).

The Respondent did not file a request for a postponement of the scheduled hearing with the OAH. Accordingly, I concluded the Respondent failed to appear for the hearing after receiving adequate notice and the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h); COMAR 28.02.01.23A; *cf.* COMAR 09.01.02.09.

II. The Merits of the Claim

The Maryland General Assembly created the Fund to provide a pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or

unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to “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). The governing statute defines “actual loss” as “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.

At a hearing on a claim, the claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant’s burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so[.]” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

Although there was no written contract, the credible evidence demonstrates the Claimant entered into a contract with the Respondent to remove a pellet stove from the living room of the property, including a brick rear portion of the pellet stove that extended onto the property’s back deck. The Respondent and Claimant agreed the Respondent would replace the pellet stove with a \$316.00 electric fireplace selected by the Claimant. The Respondent also agreed to add siding to the back of the house where the brick portion was removed, and to take away any debris, and paint the deck. The agreed-upon price for the Respondent’s work was \$2,396.00, including the electric fireplace, which the Claimants paid to the Respondent. According to the Claimant, although the Respondent removed the pellet stove from the living room and the back deck, the Respondent failed to install the electric fireplace, install the siding, remove the debris from the

Property or stain the deck in the area where the brick portion of the pellet stove was removed from the deck.

In support of his position, the Claimant testified that although the Respondent told the Claimant he would complete the replacement of the pellet stove within two weeks of the Contract (around February 13, 2018), the Respondent was continually misleading and uncommunicative about the progress of the work. Specifically, the Claimant testified the Respondent made appointments with his tenants to install the electric fireplace, causing the tenants to take leave from work but Respondent failed to appear for a number of these appointments, resulting in frustration for his tenants. The Claimant's tenant during this time, Mr. Ganzelli, corroborated the Claimant's testimony regarding the Respondent's failure to follow through with appointments the Respondent made to install the electric fireplace. Mr. Ganzelli also testified that after the Respondent removed the pellet stove and the brick structure, there was a hole in the living room wall the Respondent covered with a piece of plywood and plastic on the outer-back wall of the house and in front of the living room opening the pellet stove previously occupied. The plywood and the plastic were insufficient to keep out the cold and allowed mice to enter the house, which Mr. Ganzelli testified was very frustrating.⁴

According to the Claimant's evidence, by March 15, 2018, the Respondent had only worked on the pellet stove project for one day. Furthermore, the Claimant testified that although the Respondent told him he had measured the space for the electric fireplace, the stove the Respondent purchased was too small and had to be returned. According to the Claimant, the Respondent never reimbursed him for the cost of the fireplace. As the Claimant resides on the West Coast, the Claimant reached out to the Respondent by text and expressed his dissatisfaction with the Respondent's lack of work and communication. Ultimately, the Respondent never

⁴ Mr. Ganzelli testified the Claimant paid a pest control company to resolve the mouse problem.

completed the installation of the electric fireplace, prompting the Claimant to file a claim with the Fund.

The Claimant testified that he also filed a claim with his homeowner's insurance provider, USAA, which, after the Claimant paid a \$500.00 deductible, provided \$3,848.09 in insurance funds to the Claimant to complete the installation of the siding, paint the deck, and remove any debris. The Claimant contracted with Mr. Handyman to complete the work, including installing the electric fireplace, and the Claimant's wife, Ms. Tober, testified that she and the Claimant paid Mr. Handyman a total of \$1,603.93 to finish the siding and installation of the electric fireplace. They also purchased an electric fireplace from the online retail company, Amazon, for \$245.79. Mr. Ganzelli testified he painted the deck and the Claimant paid him \$50.00, the cost of painting materials.

As I have stated, the Respondent did not appear for the hearing, and thus, offered no evidence to rebut the Claimant's evidence. I found the Claimant and Mr. Ganzelli credible that the Respondent was inconsistent and unreliable regarding the installation of the electric fireplace. According to the Claimant and Mr. Ganzelli, the Respondent removed the pellet stove and the brick structure⁵ but he never installed the electric fireplace, installed the siding on the back of the house where the brick structure once stood, removed the debris from the removal of the brick structure or painted the deck as the Respondent agreed to do in the Contract. The Claimant presented photographic evidence to support his position. Therefore, I conclude the Respondent abandoned the electric fireplace project, leaving it incomplete.⁶ The Claimant paid the Respondent \$2,396.00, all of the money due under the Contract, but the work was not complete. The Claimant is entitled to reimbursement for any actual loss he experienced as a result of the Respondent's incomplete work.

⁵ The Claimant initially testified that the Respondent did not remove the brick structure located on the back deck. Mr. Ganzelli clarified that the Respondent did, indeed, remove the brick structure.

The Amount of the Claimant's Actual Loss

The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work and provide as follows:

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

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor 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). In determining the amount of the Claimant's actual loss, formula, I also consider that the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

If the measure of the Claimant's actual loss included only the amounts paid to the Respondent, Mr. Handyman, and Mr. Ganzelli, calculating the Claimant's actual loss would be accomplished using the formula provided at COMAR 09.08.03.03B(3)(c). This would result in an actual loss comprised of the amount the Claimant spent above and beyond the Contract price to complete the contracted-for home improvements.

In this instance, however, the Claimant received funds from his insurance company in the amount of 4,348.09. Subtracting the \$500.00 deductible the Claimant paid on the claim, the

Claimant received \$3,848.09 in insurance funds. The Claimant's actual loss is mitigated by the insurance proceeds he received from USAA to complete the installation of the electric fireplace and the siding, to paint the deck and to remove debris. I conclude that a consideration of the insurance funds dictates the use of a unique measurement to determine the Claimant's actual loss, established by subtracting the amount of the insurance funds the Claimant received from the total amount expended to complete the electric fireplace project:

	\$2,396.00	paid to the Respondent
+	<u>\$1,899.72</u>	paid to complete the Respondent's work
	\$4,295.72	total amount expended by Claimant
-	<u>\$3,848.09</u>	insurance proceeds (\$4,245.22 - \$500.00 deductible)
	\$ 447.63	actual loss

The Claimant is entitled to recover \$447.63 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(3).⁷

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$447.63 as a result of the Respondent's acts or omissions and is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$447.63; 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

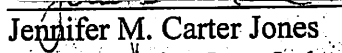
⁷ The Claimant asserted that the experience with the Respondent was terribly frustrating. According to the Claimant's wife, the Claimant was under a significant amount of stress related to personal and family health issues. To that end, the Claimant testified because he did not want the Respondent to get away with his reprehensible behavior, he and his wife flew to Maryland from California, where they now reside, to appear at the hearing. While I appreciate the Claimant's frustration, as I have stated, the Fund is not authorized to award consequential or punitive damages. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission,⁸ and

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

Signature on File

September 9, 2019
Date Decision Issued


Jennifer M. Carter Jones
Administrative Law Judge

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JCJ/emh
#181960

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

PROPOSED ORDER

WHEREFORE, this 22nd day of October, 2019, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION