

**IN THE MATTER OF THE CLAIM  
OF BARBARA DAY**

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**MARYLAND HOME IMPROVEMENT  
COMMISSION**

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**AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ACTS OR OMISSIONS  
OF EDWARD JACOBSON t/a  
EXPERT HOME REMODELERS**

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**MHIC CASE NO. 18(75)55  
OAH CASE NO. DLR-HIC-02-18-16864**

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**FINAL ORDER**

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on September 13, 2018. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 20, 2018, concluding that the homeowner Barbara Day (“Claimant”) is not eligible for compensation from the Fund because she unreasonably rejected good faith efforts by Edward Jacobson t/a Expert Home Remodelers (“Contractor”) to resolve the claim. *OAH Proposed Decision* p. 17. In a Proposed Order dated December 28, 2018, the Maryland Home Improvement Commission (“MHIC”) affirmed the Proposed Decision of the ALJ to deny the claim. The Claimant subsequently filed exceptions of the MHIC Proposed Order.

On March 7, 2019, a hearing on the exceptions was held before a three-member panel (“Panel”) of the MHIC. The Claimant was represented by Mark Oakley, Esq. and the Contractor was represented by Wayne Goddard, Esq. Nicholas Sokolow, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The following seven preliminary exhibits were offered by AAG Sokolow and admitted into evidence at the exceptions hearing: 1) November 20, 2018 OAH Proposed Decision, 2) December 28, 2018 MHIC Proposed Order, 3) Claimant’s Written Exceptions, 4) Contractor’s Suggestion of Bankruptcy, 5) Claimant’s Opposition to Notice and Request for Stay Filed by the Respondent, 6) Claimant’s

Supplemental Memorandum to Written Exceptions, and 7) Hearing Notice for the March 7, 2019 Exceptions Hearing. Neither the Contractor nor the Claimant produced a copy of the transcript of the hearing before the ALJ, and therefore the Panel's review was limited to the ALJ's proposed decision, the exhibits introduced into evidence at the OAH hearing, and the preliminary exhibits offered by AAG Sokolow at the exceptions hearing. COMAR 09.01.03.09(G) - (I).

After a review of the record and the parties' arguments on exceptions, the Commission finds that the Claimant did not unreasonably reject good faith efforts of the Contractor to resolve the claim. The Commission otherwise affirms the findings of fact of the ALJ, but reaches a different conclusion as to whether the Claimant's decision to reject the Contractor's offer to resume work was unreasonable. The Claimant provided proof at the OAH hearing that the Contractor did not pull any permits for the job. *OAH Hearing Claimant's Exhibit 14*. The ALJ, however, held that the Claimant did not provide sufficient evidence that permits were necessary for the work to be performed. *OAH Proposed Decision* p. 12-13. On exceptions, the Claimant argued that the determination of whether permits were required was a question of law and not fact. The Claimant cites to § R105.1 of the 2012 International Residential Code as the controlling authority on whether permits were required in this case. The 2012 International Residential Code was adopted by Howard County on July 9, 2012 and was later replaced by the 2015 International Residential Code, which the County adopted on June 9, 2015.<sup>1</sup> Section R105.1 of the 2012 Code reads as follows:

Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remover, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.<sup>2</sup>

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<sup>1</sup>See *History of Code Adoptions for Howard County*, <https://www.howardcountymd.gov/LinkClick.aspx?fileticket=aCTIWuqb1zE%3d&portalid=0>

<sup>2</sup> *2012 International Residential Code*, [https://codes.iccsafe.org/content/IRC2012/chapter-1-scope-and-](https://codes.iccsafe.org/content/IRC2012/chapter-1-scope-and)

The Commission may take notice of all laws and regulations governing the issues that it must decide, and finds that the Howard County residential code, as a public law, falls into the same category as any State statute or regulation the Commission may consider in rendering its decision on a claim. The code section cited shows that an application for permits would need to be submitted by the Contractor to perform the type of work called for in the contract. Therefore, the fact that the Contractor had not pulled any permits, after months had passed since the job began and roughly 67% of the contract price was paid, means the Claimant reasonably could reject the Contractor's offer to either pay her \$1,000 or resume the work.

Aside from the issue of permits, the Commission finds that the long period of inaction on the part of the Contractor alone constitutes a reasonable basis for the Claimant to reject the Contractor's offer to resume work; especially when the offer was made nearly a year after the Contractor left the jobsite while only completing a small amount of the work called for under the contract. Although the Commission recognizes that for five months the Claimant was out of state caring for her mother, the remaining time the Contractor did not appear at the jobsite, July 1, 2014 to October 2014, and April 2015 to June 26, 2015, forms a substantial amount of time during which the Contractor was neither working on the property, nor at least attempting to schedule the work with the Claimant.

After finding that the Contractor did not complete the job, and that the Claimant reasonably rejected the late efforts of the Contractor to resume work on the project, the Commission must look to the calculation of the award. Code of Maryland Regulations ("COMAR") 09.08.03.03(B)(3)(a)-(c) sets forth three formulas to be used in the calculation of an award, unless the Commission finds that a unique measurement is required. At first glance, it appears that the

third formula is the most appropriate:

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 09.08.03.03(B)(3)(c). The record contains an estimate from the licensed contractor, Gregory Custom Remodeling, LLC, to complete the remodel of the Claimant's basement. *OAH Hearing Claimant's Exhibit 16*. The ALJ, however, correctly notes in his decision that the estimate contains items that go beyond the scope of the original contract with the Contractor. *OAH Proposed Decision p. 7*. To use the total amount of this estimate and apply it in the formula at COMAR 09.08.03.03(B)(3)(c) as the cost to complete the original contract would produce an unfair result, and therefore the Commission finds that a unique measurement is required in this case.

The Commission finds that the appropriate measurement for the award subtracts the value of the work and materials provided by the Contractor, from the amount paid by the Claimant to the Contractor. The record shows that the Claimant paid the Contractor \$11,266.00 on a \$16,900.00 contract, yet the Contractor was only at the property a total of four days before ceasing work. *Proposed Decision p. 10*. During those four days the Contractor worked on framing three walls, and delivered lumber and a box of holders for recessed lighting. *OAH Proposed Decision p. 5*. As the ALJ found, this amounted to "only a portion of the first of the ten items called for in the contract." *OAH Proposed Decision p. 10-11; OAH Hearing Claimant's Exhibit 1*. The estimate from Gregory Custom Remodeling, LLC contains a valuation of the work already completed by the Contractor, and the materials left at the jobsite, of \$1,800.00. *OAH Hearing*

*Claimant's Exhibit 16.* After reviewing the record in this case, the Commission finds that this is a fair valuation of the work and materials provided by the Contractor. Therefore, using the unique measurement, the Commission calculates the compensable actual loss to be \$9,466.00.

Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this **5th** day of **June 2019 ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Order of the Administrative Law Judge is **AMENDED**;
- D. That the Maryland Home Improvement Guaranty Fund award the Claimant **\$9,466.00**;
- E. That the Contractor is ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission; AND
- F. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

**Andrew Snyder**

**Chairperson –Panel  
Maryland Home Improvement  
Commission**

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF BARBARA DAY,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF EDWARD</b></p> <p><b>JACOBSON,</b></p> <p><b>T/A EXPERT HOME REMODELERS,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE ROBERT B. LEVIN,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: DLR-HIC-02-18-16864</b></p> <p><b>* MHIC No.: 18 (75) 55</b></p>
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On May 9, 2018, Barbara Day (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,266.00 in actual losses allegedly suffered as a result of a home improvement contract with Edward Jacobson, trading as Expert Home Remodelers (Respondent).

I held a hearing on September 13, 2018, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). Mark

W. Oakley, Esquire, represented the Claimant, who was present. Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Wayne Goddard, Esquire, represented the Respondent, who was present.

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); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### **ISSUES**

1. Was the Claim timely filed with the MHIC?
2. If so, did the Claimant unreasonably reject good faith efforts by the Respondent to resolve the Claim?
3. If not, did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
4. If so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1 - Contract, date of acceptance June 18, 2014
- Cl. Ex. 2 - Photocopies of Claimant's check nos. 750 (June 18, 2014) and 783 (June 27, 2014)
- Cl. Exs. 3 – 13 inclusive - Photographs, undated
- Cl. Ex. 14 - Letter from Cathy H. Anest, Chief, Licenses and Permits Division, September 6, 2018
- Cl. Ex. 15 - Leister Brothers Custom Builders bid, June 7, 2016

- Cl. Ex. 16 - Gregory Custom Remodeling, LLC proposal and form of Contractor Agreement, January 5, 2017
- Cl. Ex. 17 - Letter from Mark W. Oakley to Michael Miller, MHIC Investigator, May 4, 2018, with attached Guaranty Fund Claim Form, May 4, 2018
- Cl. Ex. 18 - Letter from Michael Miller to Claimant, April 2, 2018, with attached blank Guaranty Fund Claim Form, undated
- Cl. Ex. 19 - Letter from Mark Oakley to Jude Wikramanayake, July 23, 2015

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

- Resp. Ex. 1 - Printout of timeanddate.com Days Calculator page (from and including Tuesday, July 1, 2014 to, but not including, Friday May 4, 2018), printed September 11, 2018
- Resp. Ex. 2 - Photocopy of Contract, date of acceptance June 18, 2014 (a duplicate of Cl. Ex. 1)
- Resp. Ex. 3 - Letter from Jude Wikramanayake to Claimant, June 26, 2015

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, May 14, 2018
- Fund Ex. 2 - Notice of Hearing, July 2, 2018
- Fund Ex. 3 - Home Improvement Claim Form, May 4, 2018, with the following attachments: Letter from Mark Oakley to MHIC, June 22, 2017, and MHIC Complaint Form, dated June 1, 2017 and received by the MHIC, June 26, 2017
- Fund Ex. 4 - Home Improvement Commission license inquiry printout, printed August 23, 2018

#### Testimony

The Claimant testified and did not present any other witness testimony.

The Respondent, who was present at the hearing, did not testify or present any other witness testimony.

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 license number 127812.
2. On June 18, 2014, the Claimant and the Respondent entered into a contract to remodel the Claimant's basement. The work was to consist of the following: framing perimeter walls and around stairs; installation of new insulation in the ceiling; installation of new recessed lighting and outlets up to code; installation of new drywall, finish, sand and prime; installation of two interior doors and base trim, paint two coats; painting of the ceiling and walls, two coats; installation of new vinyl flooring; replacement of supports for steps; cleaning up and hauling away all debris; and closing the risers to the stairs.
3. The contract did not include a provision requiring the sealing of the basement's cinder block walls, and the Claimant had no discussion with the Respondent regarding sealing the concrete block walls.
4. The contract did not include either a start date or a completion date. The Claimant understood that the work was to begin right away and be completed in about a month.
5. The agreed-upon contract price was \$16,900.00, with payment to be made as follows: a \$5,633.00 deposit, another \$5,633.00 due when the job started, and \$5,634.00 due upon completion.
6. On June 18, 2014, the Claimant paid the Respondent the \$5,633.00 deposit.
7. On June 27, 2014, the Claimant paid the Respondent \$5,633.00.
8. Prior to the formation of the contract at issue in this case, the Claimant had contracted with the Respondent on approximately eight other jobs, which the Respondent

performed satisfactorily and without complaint from the Claimant. On each of these prior jobs the Respondent came to the Claimant's house and provided an estimate. He then sent other people who performed the work, using the funds he received from the Claimant to pay his workers.

9. With respect to the June 18, 2014 contract at issue in this case, the Respondent sent Chris Bernard to the Claimant's house to perform and supervise the work. Mr. Bernard had worked for the Respondent on prior jobs for the Claimant.

10. The work under the June 18, 2014 contract began on June 27, 2014, the day the Claimant gave the Respondent the second payment.

11. On June 27, 2014, Mr. Bernard arrived to begin the job. Lumber was delivered, and Mr. Bernard worked on framing three walls.

12. The only other material, in addition to the lumber that was delivered to the Claimant's house, was a box of holders for the recessed lighting.

13. July 1, 2014 was the last day that the Respondent or anyone working for or under him performed any work under the contract.

14. The work and materials called for under the contract were not completed or delivered.

15. In approximately August 2014, Mr. Bernard told the Claimant that he had hurt his back in an automobile accident and that possibly someone else could do the work. The Claimant had no conversations with the Respondent at this time.

16. In October 2014, the Claimant called Mr. Bernard and said that she needed to leave Maryland to travel to Rochester, New York to care for her elderly mother. Mr. Bernard responded that she could contact him when she returned to Maryland.

17. The Claimant did not return to Maryland until March 2015. Upon returning she called Mr. Bernard and asked when he could return to the job. He responded that he was not taking any more work for the Respondent. The Claimant decided that she would not let the Respondent complete the job.

18. The Claimant desired a refund of what she had paid. She called the Respondent and asked him to come to her home and discuss the situation.

19. The Respondent came to her house in April 2015, at which time the Claimant stated she was not happy with the incomplete status of the job. The Respondent toured her basement. The Respondent said he would check on how much had been spent on the materials that had been delivered to her house.

20. The Claimant next received a letter dated June 26, 2015, from Jude Wikramanayake, a lawyer representing the Respondent. Mr. Wikramanayake was from a different firm than that of Respondent's counsel in this case. Mr. Wikramanayake stated in his letter:

It is my understanding that you would like to terminate the contract without cause. My client remains ready, willing, and able to complete the job. Considering that you are a prior customer and an in [sic] effort to amicably resolve matters, my client seeks to remit payment of \$1,000 to you as a full and final settlement of all claims between the parties. Otherwise, please advise when my client can begin scheduling for the contract.

(Resp. Ex. 3).

21. By letter dated July 23, 2015, the Claimant's attorney, Mr. Oakley, responded to Mr. Wikramanayake. On behalf of the Claimant, he rejected as not acceptable or reasonable the Respondent's offer to complete the contract, rejected the settlement offer of \$1,000.00, and counter-proposed that the Respondent should pay the Claimant \$9,266.00 in full settlement. The \$9,266.00 counter-demand reflected a refund of the Claimant's \$11,266.00 payment, less a

\$2,000.00 offset the Claimant attributed to the work and materials done or provided in June 2014.

22. After receiving Mr. Wikramanayake's letter and retaining Mr. Oakley, the Claimant checked with the Howard County Department of Inspections, Licenses and Permits (permits department) and was informed that the Respondent had not obtained any permits for the job at issue.

23. Although the Claimant had decided at or around March 2015 when she returned home not to allow the Respondent to complete the job, the matter of permits (or the lack thereof) factored into her decision to continue to refuse to allow the Respondent to complete the job.

24. On June 7, 2016, the Claimant received a proposal from Leister Brothers Custom Builders (Leister), a contractor not licensed by the MHIC, to finish her basement as follows: hire a company to perform a Radon test, provide a moisture barrier around the walls, insulate the walls and ceilings, finish the framing, add electrical receptacles and lights to code, install and finish new drywall, install trim and new interior doors, tile the entire floor, and paint the entire scope of the project, for a price of \$34,580. Some of those items, including the radon test and the moisture barrier, had not been included in the Claimant's contract at issue with the Respondent.

25. On January 5, 2017, the Claimant received a proposal from Gregory Custom Remodeling, LLC (Gregory), a contractor licensed by the MHIC, to finish the basement for \$21,850.00. Gregory's proposal also included items, such as additional HVAC registers and lighting, that had not been included in the Claimant's contract at issue with the Respondent.

26. On June 22, 2017, the Claimant filed a Complaint Form with the MHIC, seeking a refund of her \$11,266.00 payment. She attached to the Complaint Form a signed and sworn written statement, the June 18, 2014 contract, copies of her two checks paid to the Respondent,

eleven photographs of the basement, a letter from the permits department, and the Leister and Gregory proposals.

27. On April 2, 2018, MHIC investigator Michael Miller sent a letter to the Claimant, enclosing a blank Guaranty Fund Claim Form. Mr. Miller stated in his letter that the MHIC was administratively closing her complaint until her Guaranty Fund Claim Form was received.

28. The Claimant's attorney, Mr. Oakley, responded by letter to Mr. Miller on May 4, 2018. He enclosed with his letter, for filing with the MHIC, the Claimant's Home Improvement Claim Form (Claim Form), which was dated May 4, 2018, and received by the MHIC on May 9, 2018. The Claim Form was signed by the Claimant's counsel on May 4, 2018. In handwriting below the signature line is written: "See attached statement of [Claimant] signed under affidavit." (Fund Ex. 3). In handwriting in the date line on the May 4, 2018 Claim Form is written: "Original claim submitted 6/22/17." (*Id.*).

29. Mr. Oakley's May 4, 2018 letter to Mr. Miller stated that his prior letter of June 22, 2017 (which had enclosed the Claimant's June 22, 2017 Complaint Form), had stated, "It is [Claimant's] intention that the enclosed [*i.e.* the Complaint Form] also be accepted as her claim against the Guaranty Fund." (*Id.*).

30. On May 14, 2018, the MHIC issued its Hearing Order in this matter.

### **DISCUSSION**

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015);<sup>1</sup> Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3).<sup>2</sup> "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed

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<sup>1</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>2</sup> As noted above, "COMAR" refers to the Code of Maryland Regulations.

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)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor . . . .” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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.

#### *The Parties’ Contentions*

The Claimant argued that she paid two-thirds of the contract price but the Respondent only completed a small fraction of the job. She contended that given the lack of a permit and the lack of a provision in the contract for sealing the basement’s interior walls against water penetration she had reasonable grounds to refuse to allow the Respondent to complete the job when she returned in March 2015 from her extended stay in New York to care for her mother. She requested an award of \$9,466.00, representing the \$11,266.00 she paid the Respondent, less \$1,800.00 (representing, according to the Gregory estimate, the value of the work and materials furnished by the Respondent).

The Respondent responded that the Claimant presented no evidence that the permits department required a permit for a job involving framing a nonstructural wall, and that as no electrical work was done, any issue regarding an electrical permit was moot. He argued he did not abandon the job and that the Claimant, for whom he had satisfactorily completed no fewer

than eight prior jobs, unreasonably refused his good faith offer, set forth in his then-lawyer's June 26, 2015 letter (Resp. Ex. 3) to schedule the completion of the work.

The Respondent also argued that the Claimant's claim against the Fund was untimely filed, in that it was filed on May 4, 2018, more than three years from the date the Claimant discovered or should have discovered the alleged loss or damage.

The Fund asserted that the job was an incomplete home improvement, but was not abandoned. The Fund's position was that for the Fund not to compensate the Claimant, the Respondent would have to show the Claimant unreasonably rejected good faith efforts by the Respondent to complete the job. Fund counsel suggested that by April 2015, when the Respondent offered to complete the job but the Claimant had learned about the alleged permits problem, it may not have been unreasonable for the Claimant to reject the Respondent's offer to schedule the completion.

For the following reasons, I find that although her claim against the Fund was not untimely, the Claimant has not proven eligibility for compensation, as she unreasonably rejected good faith efforts by the Respondent to resolve the claim. Bus. Reg. § 8-405(d).

#### *Analysis*

It is undisputed that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. It is also undisputed that the Respondent performed incomplete home improvements.

The evidence established without contradiction that the Respondent, through Christopher Bernard—to whom the Respondent delegated the contract performance—did three days of work in late June and the first day of July 2014. By framing a portion of the basement's interior walls and delivering lumber and lighting receptacles, the Respondent completed only a portion of the

first of the ten items called for in the contract. Subsequently, Mr. Bernard was injured in an automobile accident. Neither he nor anyone else on the Respondent's behalf completed the work called for under the contract.

Although the Respondent performed incomplete work, I have concluded that the Claimant is nonetheless barred from recovery. The MHIC law provides that "[t]he Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Bus. Reg. § 8-405(d). Based on my review of the entire record, I find for the reasons that follow that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Therefore, I conclude that the Claimant is not eligible for compensation from the Fund.

The Claimant acknowledged that the Respondent had satisfactorily performed his obligations under *eight* prior home improvement contracts with the Claimant. Mr. Bernard began to perform the Respondent's obligations under the June 2014 contract at issue in this case, but stopped when he was injured in an automobile accident. The Claimant did not press the Respondent to return to the job. The Claimant offered no letters, emails, or text messages in which she requested or demanded that the Respondent return and complete the job. She departed Maryland from October 2014 to March 2015. When she returned to this State she learned from Mr. Bernard that he would not be completing the project, and decided not to allow the Respondent to complete the job.

Instead, she requested a refund of her payments. In response, the Respondent, through his then-attorney's June 26, 2015 letter to the Claimant, offered the Claimant a \$1,000.00 refund in full settlement, but also alternatively stated that the Respondent was ready, willing, and able to



complete the job and requested that if she declined the offered refund, she should advise when the Respondent could schedule the completion of the work called for in the contract. (Resp. Ex. 3).

The Claimant understandably rejected the \$1,000.00 offer, which I find was an unreasonable proposal, given that the Claimant had paid over \$10,000.00 for work and materials that another contractor, Gregory, estimated to be worth only \$1,800.00. Nevertheless, the \$1,000.00 "low ball" refund offer was coupled with what I find to be the Respondent's alternative, good faith offer to complete the job. I find the Claimant's rejection of that good faith offer to complete the job was unreasonable. In reaching this conclusion, I weigh most heavily the Respondent's undisputed record of satisfactorily performing eight prior jobs for the Claimant.

The Claimant testified the reasons she lost faith in the Respondent were two-fold: no permits had been obtained for the Respondent's work, and the contract did not require the Respondent to seal the interior basement walls from moisture. COMAR 09.08.01.08 provides:

In the performance of any Home Improvement Contract it shall be the non-delegable duty and obligation of the prime contractor to secure, or see to the securing of, every permit, license, or special exception necessary to the proper completion of the contract according to applicable state or local building laws.

Although the Claimant, who has the burden of proof, presented a letter from the permits department stating that no permits were issued for a job on the Claimant's basement, neither that letter nor any other evidence established that a permit was in fact "necessary" for the work called for under the contract, as required by COMAR 09.08.01.08. And, as the Respondent noted, any issue regarding an electrical permit is moot as no electrical work was done.

Absent any evidence that a permit or permits were necessary, I cannot conclude that the lack of permits provided a reasonable basis for the Claimant to reject the Respondent's written

offer (set forth in his then-attorney's June 26, 2015 letter, Resp. Ex. 3) to schedule the completion of the job, which the letter stated that the Respondent was ready, willing, and able to perform.

The Claimant also testified that she heard from unspecified other contractors that the Respondent should have been required to seal the interior basement walls against moisture. The contract, however, did not call for sealant or any other method to prevent water penetration, and the Claimant presented no expert testimony or other reliable evidence that such measures were required for a workmanlike job. Therefore, I also cannot conclude that the lack of a contract provision requiring the sealing of the basement walls provided a reasonable basis for the Claimant's refusal of the Respondent's offer in his June 26, 2015 letter to complete the job.

The evidence shows that the Respondent's work was incomplete, but neither unworkmanlike nor inadequate, and that it was incomplete because the Claimant refused to allow the Respondent to complete the job upon her return from her nearly six month absence from Maryland. She understandably did not want any work done in her home while she was out of the State, but in light of the Respondent's offer to complete the job after she returned to Maryland, I conclude that the Respondent did not abandon the contract, and that the Claimant unreasonably refused his good faith offer to complete the job under the parties' contract.

Finally, though I conclude for the above-stated reasons that the Claimant is not entitled to compensation from the Fund, I will address for the sake of completeness the Respondent's argument that the Claim against the Fund was not timely filed. To put the timeliness issue in its legal context, section 8-405(g) provides that a claim against the Fund "shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Likewise, pursuant to COMAR 09.08.03.02(G), "[a] claim

may not be brought against the Fund after 3 years from the date that the claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or damage.”

Here, the earliest possible date the Claimant could have discovered the loss or damage occasioned by the Respondent’s failure to complete the work was July 1, 2014, the last day that the Respondent or anyone working for or under him performed any work or delivered any materials under the contract. (Finding of Fact no. 13). Three years from July 1, 2014 was July 1, 2017. The Claimant filed her Claim Form with the MHIC on May 9, 2018, more than three years after July 1, 2014.

Importantly, however, she filed a separate *Complaint* Form, dated June 1, 2017, and received by the MHIC on June 26, 2017. June 26, 2017 was *within* three years from July 1, 2014. (Fund Ex. 3). Her attorney submitted the Complaint Form with a June 22, 2017 cover letter to the MHIC, in which he stated: “It is [Claimant’s] intention that the enclosed [*i.e.* the Complaint Form] also be accepted as her claim against the Guaranty Fund.” (*Id.*)

Her Complaint Form, which as noted the MHIC received on June 26, 2017, was itself accompanied by a sworn, written statement from the Claimant that began: “RE: MHIC/Guaranty Fund Complaint.” This two-page, single-spaced sworn statement spelled out in substantial detail the basis of her present Claim against the Fund. The Claimant also submitted with her Complaint Form a copy of the parties’ contract, copies of her two checks paid to the Respondent, eleven photographs depicting incomplete work, her claim calculation, a letter from the permits department, and the Leister and Gregory proposals. These documents are identical to exhibits she offered in support of her claim at the hearing in this case.

Subsequently, on April 2, 2018, the MHIC’s investigator, Michael Miller, sent a letter to the Claimant, enclosing a Guaranty Fund Claim Form, and administratively closing her

complaint until the Claim Form was received. The Claimant's attorney responded by letter to Mr. Miller on May 4, 2018, in which he enclosed for filing with the MHIC the Claimant's Home Improvement Claim Form. The Claim Form, which the MHIC received on May 9, 2018, was signed by the Claimant's counsel on May 4, 2018. (Fund Ex. 3). In handwriting below the signature line on the Claim Form the Claimant's attorney wrote: "See attached statement of [Claimant] signed under affidavit." (*Id.*). This was the same sworn statement the Claimant had submitted with her Complaint Form, which she had filed with the MHIC on June 26, 2017. In handwriting in the date line of the Claimant's May 9, 2018 Claim Form is the following statement: "Original claim submitted 6/22/17." (*Id.*). The Claimant's attorney noted in his May 4, 2018 letter that accompanied her Claim Form that his earlier letter (June 22, 2017) that enclosed her *Complaint* Form (which the MHIC received on June 26, 2017) had stated, "It is [Claimant's] intention that the enclosed [i.e. the Complaint Form] also be accepted as her claim against the Guaranty Fund." On May 14, 2018, the MHIC issued its Hearing Order in this matter.

Based on these facts, I conclude that the Claimant's Claim was timely filed with the MHIC. Although the Respondent argued that the *Complaint* form may not be deemed a *Claim* form, here the Complaint Form contained all the information required to initiate a claim, albeit on a different form, and was accompanied by the Claimant's sworn statement and several relevant exhibits. The Claimant expressly advised the MHIC that she intended her Complaint Form to serve also as her Claim against the Fund. The Complaint Form was filed within three years of July 1, 2014, the earliest date the Claimant could possibly have known she had a basis to bring a claim against the Fund. To hold the Claim untimely because it was submitted on the wrong form would literally represent a triumph of form over substance.

The Respondent also argued in support of his untimeliness argument that the Claim Form was not signed under oath by the Claimant. But, as pointed out, the Claimant submitted a detailed sworn statement under oath with her Complaint Form. Moreover, in her May 4, 2018 Claim Form, the Claimant or her attorney wrote: “See attached statement of [Claimant] signed under affidavit.” (Fund Ex. 3). In my view her incorporation by reference and attachment of her sworn, written statement satisfied the requirement that her claim be submitted under penalty of perjury.

Finally, the Respondent argued with respect to alleged untimeliness that the Claimant’s attorney—not the Claimant herself—signed the Claim Form that the MHIC received on May 9, 2018. Nevertheless, and as also previously noted, the Claimant herself signed under penalty of perjury both her *Complaint* Form as well as her sworn statement that accompanied the Complaint Form.

I conclude that by filing her Complaint Form and its attachments on June 26, 2017 (within three years of July 1, 2014, the earliest day she could have known the basis of her claim), the Claimant complied with the requirements for submitting a timely claim against the Fund. Her Complaint Form contained all the information required for a claim against the Fund, was signed under penalty of perjury by the Claimant, and the Claimant expressly stated she intended it to serve as a claim against the Fund.

I note also that the Complaint Form includes preprinted language to the effect that “[t]o initiate a Guaranty Fund claim, you must complete and submit a separate claim form, which is only available after you file this complaint form and the Commission completes its investigation of the allegations contained in this complaint.” (*Id.*). Insofar as the record discloses, the MHIC did not communicate with the Claimant or her lawyer until MHIC investigator Miller sent his

April 2, 2018 letter to the Claimant, which stated that her complaint was administratively closed, and which enclosed a claim form. The Claimant then filed her *Claim* Form on May 9, 2018, in which she stated “original claim submitted: 6/22/2017” and “see attachment of [Claimant] submitted under affidavit.” (*Id.*). The MHIC’s May 14, 2018 Hearing Order followed.

Under the circumstances of this case, I deem the Claimant’s filing of her June 26, 2017 Complaint Form satisfied the requirement of submitting a timely claim against the Fund. In essence, her May 9, 2018 Claim Form related back to June 26, 2017 and equitably tolled as of June 26, 2017 the three year deadline for submitting a claim against the Fund, as June 26, 2017 is within three years of July 1, 2014, the earliest date she knew or reasonably could have known the basis of her claim.

In sum, though I conclude that the Claim was timely filed with the MHIC, I nevertheless recommend for the reasons stated above that the Claimant’s claim should be denied because she unreasonably rejected good faith efforts by the Respondent to resolve the claim. Bus. Reg. § 8-405(d).

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claim was timely filed with the MHIC. Md. Code Ann., Bus. Reg. § 8-405(g) (2015); COMAR 09.08.03.02(G).

I further conclude that the Claimant is not eligible for compensation from the Fund as she unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

November 20, 2018  
Date Decision Issued

  
Robert B. Levin  
Administrative Law Judge

RBL/kdp  
#176514

**PROPOSED ORDER**

***WHEREFORE, this 28<sup>th</sup> day of December, 2018, 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**

Maryland Home Improvement

State's Exhibit # 2