

CLAIM OF KRISTINA WEBER	*	BEFORE MICHAEL J. WALLACE,
AGAINST THE MARYLAND HOME	*	AN ADMINISTRATIVE LAW JUDGE
IMPROVEMENT GUARANTY FUND,	*	OF THE MARYLAND OFFICE
REGARDING THE ALLEGED ACTS	*	OF ADMINISTRATIVE HEARINGS
AND OMISSIONS OF DAVID JOHNSON	*	
T/A SHILOH BUILDERS, INC.,	*	OAH NO.: DLR-HIC-02-12-25936
THE RESPONDENT	*	MHIC NO.: 09 (05) 43

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On March 30, 2009, Kristina N. Weber (the Claimant) filed a claim with the Maryland Home Improvement Commission (the MHIC or the Commission) Guaranty Fund (the Fund), for reimbursement of the actual losses she allegedly suffered as a result of the acts and omissions of David M. Johnson t/a Shiloh Builders, Inc. (the Respondent). After investigation, the Commission issued an April 4, 2012 Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) on April 9, 2012.

On May 6, 2013, I conducted a hearing at OAH's Office in Cumberland, Maryland, pursuant to section 8-407(a) (incorporating the hearing provisions of Business Regulation Article § 8-312) of the Maryland Annotated Code's Business Regulation Article. Assistant Attorney

General Jessica Kaufman appeared on the Fund's behalf, and the Claimant represented herself.

Despite adequate notice from OAH, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement.¹ Accordingly, I conducted the hearing in the Respondent's absence. *See* Business Regulation Article § 8-312(h); Code of Maryland Regulations (COMAR) 09.01.02.09.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01, and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions and, if so, what amount is the Claimant entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted two exhibits, which I admitted into evidence as Claimant Exhibits No. 1 and 2. Claimant Exhibit No. 1 has the following attachments set off in tabbed sections:

1. Overview of Losses
2. Construction Contract
3. Paid to Shiloh Builders
4. Paid Direct to Sub-contractors

¹ OAH sent its Notices of Hearing, dated September 25, 2012, November 1, 2012, and February 12, 2013 by certified and first class mail to the Respondent's addresses of record with the Commission and the Maryland Motor Vehicle Administration (MVA). The Respondent claimed the certified mailing of February 12, 2013 but the United States Postal Service returned the first class mailings of all of the Notices to OAH as undeliverable. In light of the Respondent's receipt of the February 12, 2013 Notice, he was deemed to have received proper notice of the hearing.

5. Loan Draws PFCU
6. Homeowner/Contractor Correspondence
7. Miscellaneous
8. Subcontractor Demand
9. Subcontractor Receipts
10. Arbitration Correspondence
11. Construction Costs for Project Completion
12. Present Loan Susquehanna Bank

Claimant Exhibit No. 2 is a series of 17 photographs identified as photographs A through Q.

The Fund submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. February 12, 2013 Notice of Hearing, with cover letter and attached Notices of Postponement and notices of returned mail
2. November 1, 2012 Notice of Hearing, with cover letter and attached notices of returned mail
3. September 25, 2012 Notice of Hearing, with cover letter and attached Hearing Order and notices of returned mail
4. Hearing Order, dated April 4, 2012, with attached Claim, dated March 19, 2009
5. The Respondent's licensing history
6. September 26, 2012 Affidavit of Thomas Marr, IV
7. SDAT Real Property Search for Respondent
8. Letter to Respondent, dated April 14, 2009, with attached Home Improvement Claim Form of Claimant.

No documents were submitted on the Respondent's behalf..

Testimony

The Claimant was the only witness who testified at the hearing.

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, License # 01-90992. His license expired on September 16, 2009.
2. In March 2007, the Claimant owned property at 11451 Charles Mill Road, Clear Spring, Maryland (the Property).²
3. In March 2007, the Claimant contacted the Respondent about renovating a stone structure at the above address.
4. On March 20, 2007, the Claimant entered into a contract (the Contract) to remodel the stone structure at the Claimant's address. The work included remodeling the previously gutted structure by including a great room, bedroom, bathroom, work room, kitchen and dining room. All new plumbing, electrical and radiant floor heating, new windows and doors were to be installed, interior stone walls were to be re-pointed, the chimney and fireplace were to be replaced, and the potability of the existing well was to be established possibly necessitating the installation of a holding tank. In addition, the Respondent was also to construct a storage building, which was to be attached to the existing structure (the Work).
5. This work was for a total price of \$155,000.00.
6. The Claimant made a \$5,000.00 down payment to the Respondent and subsequently paid an additional \$72,435.00 to him for a total of \$77,435.00 in payments.

² Ordinarily, under 8-405(f)(2) the claim would be excluded unless Claimant resides in the residence or does not own more than three residences. The Claimant clarified that this property is not an investment property and that she is currently living in the structure as her sole residence .

7. Despite repeated assurances by or on behalf of the Respondent that the work would progress and be completed, the Respondent ultimately went out of business on March 30, 2008, did not complete the Work and abandoned the project.

8. On July 16, 2008, the Claimant contacted LeRoy E. Myers (Myers), a licensed home improvement contractor, for an estimate on completing the Work.

9. The Claimant hired Myers who repaired and completed the Work for a cost of \$124,094.00

10. On or about March 30, 2009, the Claimant filed her Claim against the Fund in the amount of \$46,568.50.

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that she incurred an actual loss, which resulted from a licensed contractor's acts or omissions. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." For the reasons set forth below, I conclude that the Claimant has met this burden, by proving that the Respondent abandoned the Work required under the Contract and that the Claimant incurred an actual loss entitling her to an award of \$20,000.00.

The Fund presented conclusive evidence that the Respondent was, at all relevant times, a licensed home improvement contractor. The Claimant testified and presented extensive documentation establishing the Contract terms, her payments to the Respondent, the contract to complete the Work with Myers, and the Respondent's failure to complete the agreed-upon Work. The Respondent did not appear at the hearing to place any of the Claimant's evidence in dispute,

and the Fund's representative acknowledged that the evidence clearly established the Claimant's entitlement to an award from the Fund under a formula set forth in COMAR 09.08.03.03B(3).

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement 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, the computation is as follows:

Amount paid to or on behalf of the Respondent:	\$ 77,435.50
Plus amount paid to repair and complete:	+ <u>\$124,094.00</u>
Total:	\$201,529.50
Minus original contract price	- <u>\$155,000.00</u>
Actual Loss:	\$46,529.50

As explained by counsel for the Fund, the Commission may not award from the Fund more than \$20,000.00 to one claimant for acts or omissions of one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2012). Consequently, although the Claimant's actual loss is calculated at \$46,529.50 under COMAR 09.08.03.03B(3)(c), I am bound by the MHIC's policy in interpreting the amendment to section 8-405, to the same extent the Fund is. Md. Code

Ann., State Gov't § 10-214(b) (2009). Therefore, notwithstanding the amount of the actual loss as calculated under COMAR 09.08.03.03B(3)(c), because the Respondent abandoned the Contract after doing some of the Work and the Claimant then hired another contractor to complete the Work, I agree with the recommendation of the Fund's representative that the Commission should award to the Claimant the maximum amount of \$20,000.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has met her burden of proving that she incurred an actual loss as a result of the Respondent's abandonment of the Work. Business Regulation Article §§ 8-405(a) and 8-407(e)(1). The total amount of that loss is \$20,000.00, which the Claimant should be awarded from the Fund. COMAR 09.08.03.02C, 09.08.03.03B(3)(c).

RECOMMENDED ORDER

Upon due consideration, I **RECOMMEND** as follows:

1. The **MHIC ORDER** that the Claimant, Kristina Weber, be awarded \$20,000.00 from the MHIC Fund, for the actual losses she sustained as a result of the Respondent's abandonment of agreed-upon home improvement work;
2. The Respondent, David M. Johnson t/a Shiloh Builders, Inc., be ineligible for an MHIC license, under Business Regulation Article § 8-411(a), until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent; and


3. The records and publications of the MHIC reflect this decision.

May 22, 2013

Date

MJW
#142422

Signature on File


Michael J. Wallace
Administrative Law Judge

12. Present Loan Susquehanna Bank

Claimant Exhibit No. 2 is a series of 17 photographs identified as photographs A through Q.

The Fund submitted the following documents, which I admitted into evidence as the exhibits numbered below:

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7. SDAT Real Property Search for Respondent
8. Letter to Respondent, dated April 14, 2009, with attached Home Improvement Claim Form of Claimant.

No documents were submitted on the Respondent's behalf..

PROPOSED ORDER

WHEREFORE, this 28th day of June 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION