

IN THE MATTER OF THE CLAIM OF:	*	BEFORE DAVID HOFSTETTER,
FELIX N. NJEH,	*	ADMINISTRATIVE LAW JUDGE,
CLAIMANT,	*	MARYLAND OFFICE OF
AGAINST THE MARYLAND HOME	*	ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND,	*	OAH No. DLR-HIC-02-08-37634
ON ACCOUNT OF WORK	*	MHIC No. 06 (90) 3013
PERFORMED BY DAVID B.	*	
BARKLEY, t/a OMEGA	*	
CONSTRUCTION & REMODELING	*	
* * * * *		

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On November 13, 2007, Felix N. Njeh (Claimant) filed a claim with the Maryland Home Improvement Guaranty Fund (Fund) for reimbursement in the amount of \$54,901.00 for actual losses suffered as a result of home improvement work performed by David B. Barkley, t/a Omega Construction & Remodeling (Respondent).

I conducted a hearing on February 11, 2009, at the Laurel Executive Center in Laurel, Maryland, on behalf of the Maryland Home Improvement Commission (MHIC). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(c)(2) (2004). Eric B. London, Assistant Attorney General,

Department of Labor, Licensing and Regulation (DLLR), represented the Fund. Jeffrey W. Bernstein, Esquire, represented the Claimant. The Respondent failed to appear for the hearing.

Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; 09.08.03; and 28.02.01.

Notice of the hearing was sent to the Respondent by regular and certified mail at his address of record with the HIC. The certified mail "green card" was signed by the Respondent, evidencing receipt and actual notice. (Fund Ex. 1.) I, therefore, ruled that the hearing would proceed in the Respondent's absence. Md. Code Ann., State Gov't § 10-209 (2004); COMAR 09.01.02.07B, COMAR 09.01.02.09.

ISSUE

The issue is whether the Claimant sustained an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent.

SUMMARY OF THE EVIDENCE

Exhibits

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

1. Contract between Claimant and Respondent, dated September 16, 2005;
2. Cancelled checks, various dates;
3. Contract between Claimant and Respondent, with portions highlighted by Claimant, dated September 16, 2005;
4. Letter and specifications from Ken Griffin Plumbing to the Respondent, dated June 20, 2006; cancelled checks from the Claimant to Ken Griffin Plumbing, various dates;
5. Invoice from Thomas Bowie to Claimant, undated; cancelled check from Claimant to Thomas Bowie, dated August 1, 2006;
6. Cancelled check from Claimant to Thomas Bowie, dated July 18, 2006;
7. Contract between Claimant and S&J Custom Painting & Handyman Services, dated July 6, 2006; cancelled checks from Claimant to S&J Custom Painting & Handyman Services, various dates;

8. Contract between Claimant and Doctor Electric, Inc., dated May 7, 2007; cancelled check from Claimant to Doctor Electric, Inc., dated May 11, 2007;
9. Invoice from Beltway Glass & Mirrors, Inc., dated February 2, 2006; cancelled check from Claimant to Beltway Glass & Mirrors, Inc., dated February 1, 2006;
10. Invoice from J.L. Boyer Heating and Cooling, Inc., dated June 2, 2006;
11. Cancelled check from Claimant to Roto Rooter, dated July 22, 2006;
12. Contract between Claimant and Rhine Lawn Care & Landscaping, LLC, dated July 5, 2006; cancelled check from Claimant to Rhine Lawn Care & Landscaping, LLC, dated July 6, 2006;
13. Receipt from Home Depot, dated July 26, 2006;
14. Cancelled checks from Claimant to vendors for carpet installation, various dates
15. Howard County Department of Inspections, Licenses & Permits inspection certificates, various dates; Notices of Violation from Howard County Department of Inspections, Licenses & Permits, dated March 23, 2007 and March 26, 2007;
16. Proposal from J.L. Boyer Heating and Cooling, Inc., dated March 14, 2006; cancelled check from Claimant to J.L. Boyer Heating and Cooling, Inc.;
17. Proposal from General Contracting Solutions, undated;
18. Inspection Report, Atlantic Inspection Services, dated May 16, 2006;
- 19-26. Photographs;
27. Claimant's calculation of damages, undated.

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

1. Notice of Hearing, dated November 12, 2008; with attached Certified Mail Receipts and Domestic Return Receipts (green cards);
2. Hearing Order, dated September 4, 2008;
3. Licensing history for Respondent, dated February 6, 2009;
4. Home Improvement Claim Form, filed November 13, 2007;
5. Letter from John Borz, Chairman, MHIC, to Respondent, dated November 13, 2007.

The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.

Testimony

The Claimant testified in his own behalf and presented the testimony of Brian Keeler, Home Inspector, Atlantic Inspection Services.⁷ Following the Claimant's case, the Fund called the Claimant as its own witness; it presented no other witnesses.

⁷ Mr. Keeler was admitted as an expert in the fields of residential construction and home inspection.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent was licensed as a home improvement contractor with the MHIC at all times relevant to this matter. (GF Ex. 3).
2. On September 16, 2005, the Claimant contracted with the Respondent to perform extensive home improvement work at the Claimant's residence in Clarksville, Maryland. The work included construction of a new 10'x 21' addition to the front of the house, consisting of a master suite with a bedroom, walk-in closet, master bathroom with Jacuzzi, and other amenities. In addition, the contract called for extensive work on the existing house and grounds, including but not limited to, remodeling of the kitchen, construction of an exterior brick wall, exterior lighting, painting of the entire home, built-in bookshelves, new doors and windows, new heating and air conditioning systems, and plumbing and electrical work. The total cost of the contract was \$74,900.00.
3. The Claimant paid the Respondent \$64,337.00 under the contract, in various installments.
4. The Respondent began work on the project in September or October of 2005. Work on the project was slow and sporadic.
5. In May 2006, the Respondent ceased work on the project and refused to perform any further work, despite repeated requests from the Claimant.
6. On May 15, 2008, the property was inspected by Brian Keeler, a licensed home inspector with Atlantic Inspection Services.
7. The Respondent's work was incomplete in that he failed to:
 - Complete the plumbing in the master bathroom in the addition
 - Install a fan/light system in the master bathroom

- Install mirror tile on walls of the exercise room
- Provide exterior lighting in the pool area
- Install a breakfast island with granite countertop in the kitchen
- Paint the exterior of the house
- Construct built-in bookcases in the family room
- Install entrance doors and French doors in the family room
- Install railing on stairway to basement
- Provide separately-metered electrical lines and phone lines to the shed
- Provide new HVAC system to family room and new addition
- Install motion detectors around pool area
- Install brick wall and fence in pool area
- Gutters and downspouts not installed

8. The Respondent's work was inadequate or unworkmanlike in the following particulars:

- Improper grading, causing water to run toward the foundation
- Gutters and downspouts not installed, or installed improperly
- Flashing inadequate and improperly installed
- Exterior brick wall constructed with improper technique, resulting in weakness and likelihood of collapse
- Roof plumbing vent incorrectly located and improperly installed
- Gaps and other defects in interior trim and woodwork
- Doors improperly installed
- New interior wall bowed
- Crawl space constructed with inadequate ventilation, allowing moisture to accumulate
- Plumbing and electrical work installed improperly and not up to code, including improper pipe installation likely to lead to freezing pipes
- Painting done without proper priming

9. After the Respondent abandoned the job, the Claimant paid other contractors, including some of the Respondent's subcontractors, a total of \$18,471.00² to complete or correct the Respondent's incomplete, inadequate, or unworkmanlike performance. The work included plumbing to finish the additional bathroom, carpentry work, painting, electrical work, repair of a broken pump and drain pipe, mirrors, and carpeting.

² In this decision, dollar amounts are rounded to the nearest dollar.

10. In addition to the work performed by other contractors noted in Finding of Fact No. 9, above, the Claimant solicited proposals from other contractors to complete or correct the Respondent's incomplete, inadequate, or unworkmanlike work. Due to financial constraints, the Claimant has not, to date, entered into contracts with those contractors. This work includes a heating system for the addition, work to correct flooding in a crawl space, renovations to the kitchen, exterior lighting, and venting of the dryer. The fair market price for the proposed work is \$25,016.00.
11. In addition to the work noted in Findings of Fact Nos. 9 and 10, above, the Respondent failed to perform, or inadequately performed, additional contract work, for which the Claimant has not yet solicited proposals from other contractors. These items include the installation of French doors, construction of built-in bookshelves, improvements to the pool area, including paving and brick repair, and the replacement of a brick wall. The fair market price for the completion of this work is \$9,700.00.
12. In 2007, the Claimant and the Respondent participated in mediation concerning their dispute. As a result of the mediation, the Respondent agreed to pay the Claimant \$2,000.00 and complete the work. The Respondent paid the Claimant \$2,000.00, but did not perform any additional work under the contract.
13. On November 13, 2007, the Claimant filed a claim with the MHIC.
14. The Claimant suffered an actual loss of \$40,624.00.

DISCUSSION

Legal Background

The statute provides that an owner may recover compensation up to \$20,000.00 from the Guaranty Fund, "for an actual loss that results from an act or omission by a licensed

contractor....” Md. Code Ann., Bus. Reg. § 8-405(a), (c) (Supp. 2008). The 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 (2004).

COMAR 09.08.03.03B governs the calculation of awards from the Fund as follows:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney’s fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

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

...

(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.

Overview of the evidence

In this case, the Claimant contracted with the Respondent for extensive home improvement work, including the construction of a new addition and substantial improvements to the existing home. After approximately six months of sporadic work, the Respondent simply abandoned the job in May 2006. The Claimant made numerous efforts to persuade the

Respondent to return and finish the work, but he refused. Indeed, sometime in 2007 (the record is unclear as to the precise date) the parties engaged in mediation. The Claimant still wanted the Respondent to return and finish the work. The Respondent agreed to do so, but again reneged.

The Claimant presented detailed and meticulous records to support his claim that the Respondent's work was not only incomplete but inadequate and unworkmanlike. He presented an expert witness, Brian Keeler, who had inspected the home on May 16, 2006, shortly after the Respondent ceased work. Keeler prepared a comprehensive nineteen-page, single-spaced report of his inspection. (Claimant Exhibit 18.) Keeler testified persuasively as to the defects in the Respondent's work, as well as to the cost to correct or repair the Respondent's work. I find that the Claimant and Keeler both testified credibly.

After the Respondent's abandonment of the job, the Claimant hired and paid several contractors to finish and/or correct the Respondent's work. At some point, the Claimant simply ran out of money and other portions of the contracted-for work have still not been completed. Set forth below is a description of the work performed or remaining to be performed and the relevant amounts paid or to be paid to complete the work.

Contract work paid directly by the Claimant

The Claimant presented credible evidence that, subsequent to the Respondent's abandonment of the job, he (the Claimant) paid numerous contractors to complete or correct portions of the Respondent's work. The work included plumbing to finish the additional bathroom, carpentry work, painting, electrical work, repair of a broken pump and drain pipe, mirrors, and carpeting. The total of these payments was \$18,471.00. (The payments are

documented in the Claimant's exhibits and summarized in Claimant Exhibit 27.) The Fund did not contest the necessity or cost of the work, with one exception.³

Contract work remaining to be performed and for which the Claimant has received proposals

The Claimant testified and presented evidence that he has received proposals for other work included in the contract, but that he has not yet hired the contractors due to financial constraints. (Claimant Exhibit 27.) The work includes a heating system in the addition, carpentry and plumbing work, completion of the kitchen remodeling, dryer venting, and exterior lighting. The total cost for the proposed work is \$25,016.00. The Fund does not contest the necessity or cost of the work.

Contract work not performed by the Respondent for which the Claimant has not yet solicited proposals

The Claimant presented evidence, including expert testimony, regarding contract work not performed by the Respondent for which the Claimant has not yet solicited proposals. This work includes the installation of French doors, construction of built-in bookshelves, improvements to the pool area, including paving and brick repair, and the replacement of a brick wall. The Claimant's expert testified credibly that a fair price for these items is \$9,700.00. (Claimant Exhibits 18 and 27.) The Fund does not contest the necessity or cost of the work.

For all the foregoing reasons, I conclude that the Respondent failed to complete the home improvement work under the terms of the September 16, 2005 contract with the Claimant. I further conclude that the Claimant suffered an actual loss based on the cost to repair and

³ The Fund argued that payments for carpeting and carpet installation were not properly considered "home improvement." The Fund was not able, however, to cite any authority for this proposition. The amount of payments for carpeting paid to other contractors was \$1,784.00. As will be seen, Claimant's actual loss in this case is far in excess of the statutory limit. Therefore, because the question of the payments for carpeting is irrelevant to the final result in this case, and because no authority has been offered for the exclusion of the payments, I will include the payments in my calculations.

complete the project that arose from his incomplete home improvement work. Md. Code Ann., Bus. Reg. § 8-401 (2004); COMAR 09.08.03.03B(3)(c).

Calculation of Actual Loss

In light of these findings, it is necessary to calculate the amount of the Claimant's actual loss. Md. Code Ann., Bus. Reg. § 8-401; COMAR 09.08.03.03B. I must determine the amount the Claimant paid to the Respondent under the September 2005 home improvement contract, and the cost to correct the Respondent's incomplete work.

Applying the formula for calculation of an actual loss set forth in COMAR 09.08.03.03B(3)(c), where the Claimant has paid or is soliciting other contractors to repair and complete the work, the Claimant's actual loss is determined as follows:

Amount paid to Respondent:	\$ 64,337.00
Amount paid to Claimant after mediation	- <u>\$ 2,000.00</u>
Net amount paid to Respondent	\$ 62,337.00
Cost to repair and complete work:	- <u>\$ 53,187.00⁴</u>
Subtotal:	\$115,524.00
Less contract price:	- <u>\$ 74,900.00</u>
Actual loss:	\$ 40,624.00

Based on the above calculations, I find that the Claimant's actual loss is \$40,624.00. The statute limits Fund recovery to \$20,000.00 for the acts or omissions of one contractor and, therefore, that is the amount the Claimant is entitled to receive from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008).

⁴ The figure is the sum of the amount paid by the Claimant to other contractors (\$18,471.00), plus the amount reflected in proposals from other contractors to complete or correct the Respondent's work (\$25,016.00), plus the amount required to complete work specified in the contract, but for which no proposals have yet been solicited (\$9,700.00).

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss of \$40,624.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004). I further conclude that the maximum amount which a claimant can receive for a claim against the Fund for the acts or omissions of one contractor is \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2008). The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$20,000.00.

RECOMMENDED ORDER


I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission. Md. Code Ann., Bus. Reg. § 8-411 (2004); and

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

May 12, 2009
Date Decision Mailed



David Hofstetter
Administrative Law Judge

DH:k
104889

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AGAINST THE MARYLAND HOME	* ADMINISTRATIVE HEARINGS
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FILE EXHIBIT LIST

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3. Licensing history for Respondent, dated February 6, 2009;
4. Home Improvement Claim Form, filed November 13, 2007;
5. Letter from John Borz, Chairman, MHIC, to Respondent, dated November 13, 2007.

The Respondent failed to appear for the hearing and offered no exhibits for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 22nd day of June 2010, 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION