

IN THE MATTER OF THE CLAIM * BEFORE JAMES W. POWER,
OF PERICLES TSAMPOS AGAINST * AN ADMINISTRATIVE LAW JUDGE
THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF * OAH NO.: DLR-HIC-02-10-24853
EUGENE KLEMKOWSKI, T/A * MHIC NO.: 08 (05) 1487
CLEAR VIEW CONSTRUCTION *

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On June 3, 2008, Pericles Tsampos (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,900.00 for actual losses suffered as a result of the acts or omissions made by Eugene Klemkowski, t/a Clear View Construction (Respondent).

I conducted a hearing on November 18, 2010 at the Office of Administrative Hearings, Hunt Valley, Maryland Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2010). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimant was present and represented himself. The Respondent failed to appear for the hearing after being properly notified.

Procedure in this case is governed by the contested case 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 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; and COMAR 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

Fund Ex. #1	Notice of Hearing
Fund Ex. #2	Notice of Hearing
Fund Ex. #3	MHIC Licensing Printout
Fund Ex. #4	Claim Form
Fund Ex. #5	Letter from MHIC to Respondent
Fund Ex. #6	Letter from Claimant
Fund Ex. #7	Letter from MHIC
Fund Ex. #8	Complaint Form

The Claimant submitted the following exhibits:

Cl. Ex. #1	Invoice from Walbrook Mill and Lumber
Cl. Ex. #2	Contract with Respondent

Testimony

The Claimant testified on his own behalf.

The Fund did not present any witnesses.

FINDINGS OF FACT

I find the following 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 license number 3897162 t/a Clear View Construction.
2. In 2007 the Claimant purchased a residential property at 321 S. Durham Street in Baltimore City. The property was a row home and the Claimant intended to refinish the house and use it as his residence. At the time of purchase it was not habitable and the Claimant was living with his parents.
3. On June 21, 2007, the Claimant and Respondent entered into a contract for the Respondent to install five double hung wooden windows at the house. The contract price was \$5,100.00. The Claimant paid the Respondent \$2,900.00 in cash at the time the contract was signed.
4. The Respondent used \$1,200.00 of the money from the Claimant to buy the windows at Walbrook Mill and Lumber. However, this amount was not sufficient to pay for all the windows, which were custom made.
5. The Respondent failed to obtain the windows and did not do any work on the house. Despite repeated requests from the Claimant, the Respondent never returned the money or did any work.
6. The Claimant went to Walbrook Mill and Lumber and was informed that the Respondent had paid \$1,200.00, but that the windows were not finished because the balance had not been paid. The Claimant paid \$2,265.00 to have the windows finished.
7. A family friend, who was a licensed contractor, agreed to install the windows at no cost.

8. The Respondent was notified by regular and certified mail of the claim and the hearing but failed to appear for the hearing.

DISCUSSION

Maryland law provides that an owner may recover compensation 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) (Supp. 2010). Section 8-401 of the Business Regulation article 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 (2010). The burden of proof to establish the unworkmanlike or inadequate home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2010).

Based on the evidence presented by the Claimant, I find that he is entitled to an award in this case. The evidence clearly shows that the Claimant hired the Respondent to install five windows at a house being renovated. The Claimant paid \$2,900.000 in cash. The Respondent did use \$1,200.00 of this money to buy the windows. However, he never paid the balance or did any work, despite repeated complaints from the Claimant. Therefore, the Respondent abandoned the job and the Claimant is entitled to an award.

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.

...

(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 09.08.03.03.b

Although the Claimant found a family friend who was willing to install the windows at no cost, I do not believe that the Claimant should be penalized for this fact. The Claimant paid \$2,900.00 to the Respondent and \$2,265.00 to Walbrook Mill and Lumber for a total of \$5,165.00, which is \$65.00 more than the contract price. Using section (c) would essentially negate any award.

Although the Respondent paid money to have the windows built, this does not constitute doing "work" within the meaning of the above sections. The Claimant paid the Respondent \$2,900.00 and received nothing for \$1,700.00 of this amount. The Claimant's efforts to mitigate his damages does not lessen the Respondent's liability for abandoning the job.

Therefore, the appropriate section to use is section (a), which applies to a contractor who did not do any work and abandoned the job. Based on that section the Claimant is entitled to a

return of the money paid to the contractor. The Claimant paid \$2,900.00 and is entitled to the return of the \$1,700.00 for which he received no materials or services.

CONCLUSIONS OF LAW

For the reasons discussed above, I conclude that the Claimant has established by a preponderance of the evidence that the Respondent abandoned a home improvement contract and that the Claimant suffered an actual loss compensable by the Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and 8-407(e)(1) (2010 & Supp. 2010).

RECOMMENDED ORDER


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

ORDER that the Claimant be awarded \$1,700.00 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.

December 8, 2010
Date Decision Mailed



James W. Power
Administrative Law Judge

JWP/tc
#118394

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PROPOSED ORDER

WHEREFORE, this 10th day of February 2011, 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