

and Regulation (DLLR), represented the Fund. The Respondent failed to appear after due notice to his address of record.

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) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent? If so, what is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1 Contract, September 26, 2008, with attached addenda, specifications, and Prince George's County Permit, October 30, 2008
- Cl. Ex. 2 Copies of four checks payable to the Respondent, dated September 26, November 6, November 24, and November 24, 2008
- Cl. Ex. 3, 3A Two color photographs of work in progress, undated
- Cl. Ex. 4 Letters to the Respondent from Claimant's attorney, Jason R. Potter, Esquire, March 2 and March 10, 2009, with attached proposed Addendum to Home Improvement Contract
- Cl. Ex. 5 Contract and Payment Schedule by Barron Brothers, Inc., March 9, 2009, with attached Invoice, June 11, 2009; Letter to Barron Brothers, Inc. from Jason R. Potter, Esquire, May 29, 2009; and copies of two checks payable to Barron Brothers, dated March 10 and October 27, 2009
- Cl. Ex. 6 Contract with Brightview Builders, Inc., January 14, 2010, with attached copies of three checks payable to Brightview Builders, dated January 14, March 13, and

April 23, 2010; General Specification Sheet, December 15, 2009; Prince George's County Permit, November 4, 2009; Prince George's County Certificate of Occupancy, April 21, 2010

Cl. Ex. 7 E-mails and letters between the Claimant and Respondent, dated from October 30, 2008 to February 24, 2009; E-mails between the Claimant and Jason R. Potter, Esquire, dated from February 16, 2009 to March 11, 2009; E-mails between the Claimant and Jennifer Grimes, former MHIC Investigator, March 1 and March 2, 2009

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

- GF Ex. 1 Notice of Hearing, September 6, 2012, with attached regular and certified mail letters returned by the U.S. Postal Service; Notice of Hearing, February 1, 2013, showing additional address for the Respondent
- GF Ex. 2 Licensing Information for the Respondent, printed February 19, 2013
- GF Ex. 3 Affidavit of Thomas Marr, Investigator, MHIC, January 30, 2013
- GF Ex. 4 Hearing Order, August 8, 2012
- GF Ex. 5 Home Improvement Claim Form with attached narrative, November 3, 2011
- GF Ex. 6 Letter to the Respondent from the MHIC, November 15, 2011

No exhibits were offered on the Respondent's behalf.

Testimony

The Claimant testified on his own behalf. The Fund did not present any witnesses.

Because the Respondent failed to appear, no testimony was offered on his behalf.

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 registration number 01-90974. GF Ex. 2.
2. The Respondent's MHIC license expired on or about September 16, 2009. It was subsequently suspended on October 28, 2011 and remains so. GF Ex. 2.

3. On or about September 26, 2008, the Claimant and the Respondent entered into a contract for home improvement work on the Claimant's residence (Contract). The scope of work under the Contract was to convert an existing carport to a one-story addition, to provide an "in-law suite" for the Claimant's father, aged 83. Cl. Ex. 1. The original contract price was \$34,200.00. *Id.*
4. The Contract provided that work would commence upon receipt of a building permit, and estimated that work would be completed sixteen weeks after starting the project. A building permit was issued on October 30, 2008. Cl. Ex. 1. Work commenced on or about November 3, 2008. *Id.*
5. The Claimant made four payments to the Respondent by check between September 26 and November 24, 2008. Cl. Ex. 2. These payments totaled \$20,600.00, or approximately 60% of the original contract price.
6. Through the end of November, 2008, the Claimant was generally satisfied with the progress of the work performed by the Respondent's agents and employees on the project. During this time frame, the Respondent made verbal representations that the project would be completed by Christmas.
7. In December 2008, progress on the project slowed down significantly. Dissatisfied, the Claimant requested a meeting with the Respondent. *See* Cl. Ex. 7.
8. At some time prior to December 17, 2008, the Claimant noticed condensation in his daughter's bedroom on the other side of the existing brick wall, which the Respondent's workers had begun demolishing. The Respondent's employees eventually stuffed some fiberglass insulation into the wall. *See* Cl. Ex. 3.

9. At around the same time, although the framing was essentially complete, the concrete slab had not been laid, the necessary sheathing had not been installed, and there was a pile of dirt or debris in the Claimant's driveway. *See* Cl. Ex. 3A.
10. At a meeting on December 17, 2008, the Claimant and the Respondent verbally agreed to a change order reducing the contract price to \$31,200.00. The Claimant decided not to install a full bathroom in the addition (item 10 in the original Specifications), and therefore received a credit of \$2,100.00. The Respondent provided this change order in written form on February 8, 2009, but the parties never signed it.
11. Throughout January and February, 2009, only minimal work was performed on the project. *See* GF Ex. 5, attached narrative. The Claimant was only able to speak directly with the Respondent twice by telephone after December 17, 2008; all other contacts were with John Emrico (Emrico), the Respondent's foreman. *Id.* At the end of February 2009, the Claimant learned that the Respondent was in North Carolina.
12. On March 2, 2009, through counsel, the Claimant proposed to the Respondent in writing that the parties terminate the Contract for convenience, without further obligation on either side. Cl. Ex. 4. Although the Respondent had previously indicated in a telephone call with the Claimant that he would terminate the Contract verbally by telephone, he did not respond to the letter from the Claimant's counsel or sign the proposed agreement terminating the Contract for convenience.
13. The Claimant, through counsel, terminated the Contract for cause on March 10, 2009. Cl. Ex. 4.

14. On or about March 9, 2009, the Claimant hired Barron Brothers, Inc. (Barron), MHIC #77337, to correct and complete the project. Cl. Ex. 5. The original price under the Barron contract was approximately \$24,649.00. *Id.*
15. It was Barron's opinion that only 15-17% of the work performed by the Respondent could be utilized and built upon. Cl. Ex. 5.
16. The Claimant paid Barron a deposit of \$6,162.28 on March 10, 2009 and a final payment of \$3,000.00 on October 27, 2009. Cl. Ex. 5. The Claimant authorized Barron to perform or obtain the following items:
 - Plans and permits—\$500.00
 - Beam removal and install of LVL¹—\$675.78
 - Reframe of 2" x 6" framed bearing wall—\$1,500.00
 - 4'0" kneewall—\$574.22
 - Upgrade to 2 casement & stationary windows (aluminum clad)—\$742.00
 - ½" exterior foam insulation board—\$526.50
17. The total cost of the work performed by Barron was \$4,518.50. Cl. Ex. 5.
18. As of late May 2009, the Claimant was becoming dissatisfied with Barron. Cl. Ex. 5. The Claimant and Barron terminated their contractual relationship in October 2009.
19. On January 14, 2010, the Claimant hired Brightview Builders (Brightview), MHIC #27258, to correct and complete the work that the Respondent was to have performed under the Contract, with some minor changes (e.g., additional insulation). Cl. Ex. 6.
20. The Claimant paid Brightview a total of \$32,155.00 to complete the addition project.
21. The Claimant's actual loss is \$25,173.50.

¹ This abbreviation is not explained on Cl. Ex. 5.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent him appeared. On September 6, 2012, the OAH sent a Notice of Hearing (Notice) by certified and regular first class mail to the Respondent's last business address of record, 209 Capershire Drive, Lewes, DE 19958. GF Ex. 1; *see also* GF Ex. 2. The Notice advised the Respondent of the time, place and date of the hearing. The Notice further specified that failure to appear at the hearing could result in an adverse decision against the non-appearing party. The United States Postal Service (USPS) returned the regular and certified mail copies of the Notice as "No Such Number." GF Ex. 1.

Also on September 6, 2012, the OAH sent the Notice by certified and regular first class mail to the Respondent's home address of record, 5375 Duke Street, Alexandria, VA 22304. GF Ex. 1; *see also* GF Ex. 2. The USPS returned the regular mail copy of the Notice as "Insufficient Address." GF Ex. 1. The USPS returned the certified mail copy of the Notice as "Not deliverable as addressed." GF Ex. 1.

The Fund produced evidence that as of January 2013, the address contained in the driver's license records of the Maryland Motor Vehicle Administration (MVA) for Richard Tadlock was 7500 Mendota Place, #1, Springfield, VA 22150. GF Ex. 3. On February 1, 2013, the OAH sent another copy of the Notice, by certified and regular mail, to the Respondent at that address. GF Ex. 1. Neither copy of the February 1, 2013 Notice was returned.

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice 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) (2010). The procedures for notice applicable to disciplinary proceedings also apply to claims against the Fund. *Id.* § 8-407(a).

Indeed, a claim against the Fund can be joined with a disciplinary proceeding based on the same facts. *Id.* § 8-408(a).

The OAH sent the Notice by certified mail to the Respondent's business address of record, as required by section 8-312(d) of the Business Regulation Article, as well as to two residence addresses of record. Upon the showing by the Fund, I determined that service was proper and that the Respondent had notice of the hearing.² Consequently, I directed that the hearing proceed in the Respondent's absence under section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07.

Applicable Law

An owner may 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) (Supp. 2012). *See also* COMAR 09.08.03.03B(2). Actual loss "means 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). In order to be compensated by the Fund, the Claimant bears the burden of proving by a preponderance of the evidence that he suffered an actual loss incurred as a result of misconduct by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2012) and § 8-407(e) (2010); COMAR 09.08.03.03.

Analysis

There is no dispute that the Respondent held a valid contractor's license during all relevant times. There is also no dispute that the Claimant is an owner and that there is no

² When notice has been provided in the manner required by statute or regulation, the party to whom the notice has been directed has no legitimate claim that the notice given was inadequate or defective. *State v. Barnes*, 273 Md. 195, 210 (1974). Under Maryland law, there is a presumption of delivery and receipt of mail that arises upon a showing that material is properly mailed. *Brenner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996); *Border v. Grooms*, 267 Md. 100, 104 (1972).

procedural impediment barring him from recovering from the Fund (too many homes owned, a family relationship to the Respondent, etc.). Md. Code Ann., Bus. Reg. § 8-405(f) (Supp. 2012).

In this case, the Claimant has shown by a preponderance of the evidence that the Respondent performed an incomplete home improvement at the Claimant's residence in Lanham, Maryland. Although progress was satisfactory until approximately the end of November 2008, in December 2008 the Claimant began to notice sloppy workmanship and a dramatic decrease in the rate of progress on the job. Prompt performance was important to the Claimant because the purpose of the project was to provide a living space for the Claimant's elderly father.

The evidence produced by the Claimant documents the condition of the project in early December 2008, and the Claimant's numerous but unsuccessful efforts to obtain satisfaction from the Respondent and his foreman, Emrico, in January and February 2009. Without belaboring every detail contained in the Claimant's written narrative and hearing testimony, which I found credible, I conclude that the Respondent's work under the Contract was incomplete, because he essentially abandoned the job by the end of February 2009. As a result, the Claimant terminated the Contract and hired other contractors to complete the project.

The Claimant testified that the Respondent insisted that the work was 70% complete at the time the parties' relationship deteriorated. As of that point, the Claimant had paid 64% of the revised contract price, but a subsequent contractor, Barron, estimated the project was less than 20% complete in March 2009. Although there were some differences in the specific proposals, both Barron and Brightview, the contractor who eventually finished the project, priced the necessary work in the \$30,000.00 range. When one considers that the Respondent's original contract price was \$34,200.00, it is reasonable to infer that the work performed by the Respondent before he abandoned that job was far less than 70% of the contemplated work.

Recommended Award

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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 the applicable COMAR formula, the Fund explained the computation as follows:

Amount paid to the Respondent:	\$20,600.00
Plus amount payable to repair and complete:	<u>\$36,673.50³</u>
Total:	\$57,273.50
Minus revised contract price	<u>\$32,100.00</u>
Actual Loss:	\$25,173.50

However, the Claimant is entitled to only a portion of his actual loss from the Fund. The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) and (5) (Supp. 2012). The Claimant paid the Respondent \$20,600.00, which is less than the actual loss

³ This figure is the sum of \$32,155.00 (paid to Brightview) and \$4,518.50 (paid to Barron for items actually completed).

computed using the formula noted in COMAR 09.08.03.03B(3)(c). The Fund recommended that the Claimant be reimbursed in the amount of \$20,000.00 from the Fund.⁴ I concur.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$25,173.50 as a result of the Respondent's acts and omissions, and that \$20,000.00 of that actual loss is compensable by the Fund. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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 under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

May 9, 2013
Date Decision Mailed

Signature on File

Una M. Perez
Administrative Law Judge

UMP/ch
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⁴ The governing statute provides that the "Commission may not award . . . more than \$20,000.00 to one claimant for acts or omissions of one contractor . . ." The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. *Compare* Md. Code Ann., Bus. Reg. § 8-405(e)(1)(Supp. 2012) with COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Balt. Cnty.*, 414 Md. 265, 276 (2010).

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DAVID R. REYNOLDS,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF RICHARD</p> <p>TADLOCK,</p> <p>RESPONDENT</p>	<p>* BEFORE UNA M. PEREZ,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-12-32194</p> <p>* MHIC NO.: 09 (75) 1497</p> <p>*</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

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No exhibits were offered 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.

Joseph Tunney

*Joseph Tunney
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION