

IN THE MATTER OF THE CLAIM * BEFORE A. ELIZABETH ROJUGBOKAN,
OF LARRY BURLEY * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR * OAH NO.: DLR-HIC-02-10-31489
OMISSIONS OF DENNIS MICHAEL * MHIC NO.: 10(05)583
MANION *

* * * * *

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 April 20, 2010, Larry Burley (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$15,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Comfortable Home Improvements, Inc., Dennis Michael Manion, responsible party (Respondent).

I held a hearing on December 16, 2010, at the County Office Building, 1400 McCormick Drive, Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Hope M. Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Jason A. DeLoach, Esquire, Alexander & Cleaver, represented the

Claimant, who was present. 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 the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01–09.01.03.10; 09.08.02.01-09.08.01.02; and 28.02.01.01-28.02.01.27.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions and, if so, what was the amount of the award?

SUMMARY OF THE EVIDENCE

Exhibits

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

- CI #1 Letter from Respondent to the Claimant, August 8, 2007
- CI #2 Checks from the Claimant to the Respondent as follows:
 - Check #0244 for \$11,000.00, August 8, 2007
 - Check #0250 for \$12,000.00, December 13, 2007
- CI #3 Letter from the Respondent to the Claimant, January 10, 2008
- CI #4 Letter from the Respondent to the Claimant, May 27, 2008
- CI #5 Letter from the Respondent, June 19, 2008
- CI #6 Estimate from Jay Dark, JJays Services, June 1, 2010
- CI #7 J & M Electrical Service proposal, March 30, 2009
- CI #8 Checks from the Claimant
 - Check #119 to J & M Electrical Service for \$660.00, March 30, 2009
 - Check #120 to J & M Electrical Service for \$660.00, April 3, 2009
 - Check #129 to J & M Electrical Service for \$330.00, May 15, 2009

- CI #9 Pepco Invoice, November 17, 2008
- CI #10 Estimate, May 9, 2009
- CI #11 Photographs A through L

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

- Fund #1 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by certified mail to Respondent's home address, 2311 Knotweed Court, Brandywine, Maryland 20613, returned insufficient address; no such street
- Fund #2 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by first class mail, to Respondent's home address, 2311 Knotweed Court, Brandywine, Maryland 20613, returned insufficient address; no such street
- Fund #3 DLLR Licensing History, November 10, 2010
- Fund #4 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by certified mail to Respondent's business address, 13801 Brandywine Road, Brandywine, Maryland 20813, signed green card, September 16, 2010
- Fund #5 Letter from MHIC to the Respondent, April 27, 2010

The Respondent did not offer any exhibits for admission.

Testimony

The Claimant testified and presented the testimony of Jay Dark, admitted as an expert in home improvement.

The Respondent did not testify and presented no witnesses.

The Fund presented no witnesses.

FINDINGS OF FACT

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

1. The Respondent was a licensed home improvement contractor under MHIC license number 3440844 between September 25, 2006 and October 19, 2008. The Respondent

remained at the same business address of record through the length of the licensing period. The Respondent's license was not renewed after October 19, 2008.

2. On August 8, 2007, the Claimant and the Respondent entered into a contract for the Respondent to build a thirteen by eleven foot kitchen addition onto the rear of the Claimant's home. The contract stated that work would begin October 1, 2007, and would be completed by approximately December 1, 2007.

3. The original agreed upon contract price was \$34,000.00. The Claimant paid \$23,000.00 in installments as follows:

<i>Date</i>	<i>Check #</i>	<i>Amount Paid</i>
August 8, 2007	Check #0244	\$11,000.00
December 13, 2007	Check #0250	\$12,000.00
Total		\$23,000.00

4. The Respondent did not perform any work between October 2007 and December 2007. The Respondent promised the Claimant that work would begin after Pepco and an electrician relocated the overhead power line, electrical meter and underground electrical service. The costs for setting up the overhead and underground electrical relocation work were not included in the agreed-upon scope of work.

5. On January 10, 2008, the Respondent provided a revised schedule with a new start date of January 14, 2008 and a new projected completion date sometime at the end of February 2008.

6. The Respondent again delayed starting the work until the outside electrical work was completed. By the end of July 2008, the Respondent had successfully coordinated the electrical work relocation.

7. Between August 4, 2008 and August 7, 2008, the Respondent poured the footers, foundation, framed the addition, and installed windows. The last time the Respondent performed work at the Claimant's home was on August 7, 2008.

8. The Respondent left the following items incomplete: house wrap, siding, gutters, duct work (heating and cooling), insulation, electrical (outlets and lighting), drywall, painting, molding and hardwood flooring.

9. The Claimant's wife called the Respondent in an effort to have him return to complete the work, but his telephone was out of service. The Claimant also stopped by the Respondent's office in Brandywine, knocked on the door, but there was no response.

10. On March 30, 2009, the Claimant paid \$1,650.00 to complete the electrical work inside the new addition. On June 25, 2009, he also paid \$785.00 to have construction debris removed from the property.

DISCUSSION

Respondent's Failure to Appear:

A contractor is required to notify the MHIC within ten days of any change in address. Md. Code Ann., Bus. Reg. § 8-309 (2010). Notice of a hearing must be sent to the contractor at least ten days "before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2010). In this case, the OAH sent a Notice of Hearing (by both certified mail and regular mail) on September 15, 2010, to the Respondent at his last business address on record with the MHIC. The hearing was scheduled for December 16, 2010, which is ninety-two days after the notice of hearing was sent to the Respondent.

A hearing may proceed in the absence of a contractor after being provided proper notice.

Md. Code Ann., Bus. Reg. § 8-312(h) (2010); COMAR 09.01.02.09. In this case, the Respondent was provided proper notice of the hearing when he was mailed timely notice of the hearing scheduled for December 16, 2010 to his business address of record with the MHIC. The Notice of Hearing sent by regular mail was never returned to the OAH by the postal authorities. The Notice of Hearing sent by certified mail was claimed and the signed certified mail green card, dated September 16, 2010, was returned to OAH. Fund Exhibit #4. Pursuant to COMAR 09.01.02.07, a document served by mail under this regulation is presumed to have been received by the addressee three days after the date the document was mailed. Moreover, the signed certified mail green card acknowledges the Respondent's receipt of the notice. The Respondent, however, failed to appear on the scheduled hearing date. Based on the foregoing discussion, I conclude that the Respondent was provided due notice of the hearing and the hearing properly proceeded in his absence.

Merits of the Claim:

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) (2010). *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).

First, I find that the Respondent was a licensed home improvement contractor, between September 25, 2006 and October 19, 2008. Fund Exhibit #3; Finding of Fact #1. The Respondent entered into a contract with the Claimant on August 7, 2007 and performed work at his home between August 4, 2008 and August 7, 2008. Claimant's Exhibit #1; Finding of Facts

#2 and 7. Therefore, I can turn to the Claimant's claim for actual loss as a result of an act or omission by the Respondent.

Second, I find that the Respondent performed incomplete home improvement work based on the evidence presented.

The Claimant testified regarding the agreed-upon scope of work and the amounts he paid. Essentially, the Claimant contracted with the Respondent to build an addition onto the rear of his home, which would double the size of his kitchen. The work included construction from the ground up including a foundation, framing, lighting, drywall, flooring, and painting. Claimant's Exhibit #1. He paid two installments, one payment in August 2007 for \$11,000.00, and a second payment in December 2007 for \$12,000.00 (\$23,000.00), out of a total contract price of \$34,000.00. Claimant's Exhibit #2.

The Claimant then testified concerning the Respondent's multiple construction delays. The Respondent repeatedly delayed the start of the work as he arranged the relocation of the overhead power line, electrical meter and underground electrical service. Although the Claimant contracted for the work to begin on August 8, 2007, the work did not begin until almost a year later, after the outside electrical work was completed. The Claimant explained that the Respondent agreed to perform extra work worth approximately \$6,000.00 to \$7,000.00 (free of charge) to make up for the construction delays. The Claimant noted, however, that despite the Respondent's promises, the six-week anticipated project was soon reduced to four days of work, August 4, 2008 through August 7, 2008.

The Claimant explained that the Respondent did not return after August 7, 2008 despite efforts to contact him by telephone and at his office. The Claimant's wife called

the Respondent some time after August 7, 2008, but his telephone was out of service. The Claimant also stopped by the Respondent's office in Brandywine, knocked on the door, but there was no response. After two years of waiting, it soon became evident to the Claimant that the Respondent had no intention of returning to complete the work.

The Claimant identified the work the Respondent left incomplete: house wrap, siding, gutters, duct work (heating and cooling), insulation, electrical (outlets and lighting), drywall, painting, molding and hardwood flooring. The Claimant produced twelve photographs to highlight some of the incomplete work. Claimant's Exhibits #11A - 11L. The Claimant noted that he had a beautiful azalea garden prior to the Respondent beginning his work, which was subsequently destroyed by the construction debris left in the Claimant's yard. Based on the condition of the work site, the Claimant obtained an estimate for landscaping work on June 25, 2009 for \$3,398.00. Claimant's Exhibit #10. The Claimant then offered an estimate, from Mr. Dark, JJays Services dated June 1, 2010, for the completion of the remaining work totaling \$28,680.00. Claimant's Exhibit #6. Finally, the Claimant submitted documentation to show that he hired and paid a second electrician, J & M Electrical Service on March 30, 2009 a total of \$1,650.00 to complete the interior electrical work. Claimant's Exhibits #7 and 8.

Based on the evidence presented, I find that the Claimant has proven eligibility for compensation. I find that the Claimant demonstrated through testimony and photographs that, after only working four days on an anticipated six week project, the Respondent did not complete the work.

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).

The first formula, pursuant to COMAR 09.08.03.03B(3)(a), is follows:

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.

This formula does not apply in this case, because the Respondent did not abandon the contract without doing any work.

The second formula, pursuant to COMAR 09.08.03.03B(3)(b), is as follows:

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.

Mr. Dark, the Claimant's expert witness, testified that the Respondent's work was valued at approximately \$5,320.00. I do not, however, give any weight to Mr. Dark's estimated value since Mr. Dark never saw the work or reviewed the contract for the scope of work. As a result, this formula cannot be applied, because the Claimant did not provide credible evidence of the value for the work performed by the Respondent.

The third formula, pursuant to COMAR 09.08.03.03B(3)(c), is as follows:

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.

First, the Claimant requests reimbursement for a June 25, 2009 landscaping sales order of

\$3,398.00, listing six items. I find, however, that only one of the items listed is potentially recoverable under the Fund. A breakdown of the sales order is as follows:

<i>Description of work</i>	<i>Amount</i>
Haul off trash	\$785.00
Remove dead plants	\$495.00
Replant new Azaleas	\$65.000
Install soil	\$225.00
Install sod	\$1,700.00
Remove dead Azaleas	\$128.00
Total	\$3,398.000

Five of the six items are related to landscaping work, but there is no landscaping work included in the agreed-upon scope of work. Moreover, the Claimant noted that the only reason he paid for landscaping work was to repair what the Respondent destroyed when he left construction debris on his lawn. Claimant's Exhibit #111. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Therefore, I conclude that five of the six items listed in the invoice are not compensable under the Fund. I do, however, conclude that one of the items referenced, hauling of the construction debris, is within the scope of the agreed upon work. Therefore, once again, I do not give any merit to Mr. Dark's \$28,680.00 estimate of the costs to complete the Respondent's work.

Second, the Claimant's request for reimbursement based on Mr. Dark's \$28,680.00 estimate is not recoverable based on Mr. Dark's testimony that he did not see any of the

Respondent's the work and never reviewed the contract for the scope of work.¹ Mr. Dark also could not explain how his \$28,680.00 cost estimate was calculated since he did not keep any notes. Mr. Dark admitted that he relied solely on the information relayed to him by the Claimant regarding incomplete work. Therefore, I conclude that the Claimant has not provided any evidence that he sustained an actual loss in the amount of \$28,680.00.

Third, the Claimant did not submit any other estimate, other than from Mr. Dark, to show the costs of completion of the work. The Claimant admitted that he completed the work himself, with the assistance of his friends and family. The Claimant also explained that he purchased his own materials from either The Home Depot or Lowes but did not retain any of the receipts. The Claimant has not presented any other credible evidence, in the form of estimates or receipts, to show the amounts he paid to have the work completed. Given the evidence presented to support using the third formula, the calculation is as follows:

<i>Amount Paid</i>	<i>\$23,000.00</i>
+ reasonable amounts paid to complete interior electrical work (\$1,650.00) & hauling construction debris (\$785.00)	\$2,435.00
Total Amounts Paid	\$25,435.00
- contract price	- \$34,000.00
	(\$8,565.00)

Therefore, using the third formula and applying it to the credible evidence in the record, it does demonstrate an actual loss. Moreover, I cannot apply a unique measurement in this case either, because the Claimant had an ample opportunity provide documentation, in the form of receipts

¹ Mr. Dark testified regarding his \$28,680.00 estimate. He detailed each of the fourteen contract items but did not provide a price breakdown for each item. Mr. Dark noted that he had, at one time prepared something listing the individual prices but did not keep it for his records. Moreover, he explained that he never actually saw the work performed by the Respondent or reviewed the Respondent's contract for scope of work. Instead, he relied solely on his conversation with the Claimant regarding what kind of work he sought to have performed.

and/or estimates, to support any amount he paid to complete the scope of work, yet did not do so. See COMAR 09.08.03.03b(3). As a result, the record does not establish that the Claimant has sustained an actual loss.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual loss compensable by the Fund. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the claim be dismissed, and


ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

March 9, 2011

Date Decision mailed

AER/**
119975


A. Elizabeth Rojumbokan
Administrative Law Judge

**IN THE MATTER OF THE CLAIM * BEFORE A. ELIZABETH ROJUGBOKAN,
OF LARRY BURLEY * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR * OAH NO.: DLR-HIC-02-10-31489
OMISSIONS OF DENNIS MICHAEL * MHIC NO.: 10(05)583
MANION ***

* * * * *

FILE EXHIBIT LIST

Exhibits

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

- CI #1 Letter from Respondent to the Claimant, August 8, 2007
- CI #2 Checks from the Claimant to the Respondent as follows:
 - Check #0244 for \$11,000.00, August 8, 2007
 - Check #0250 for \$12,000.00, December 13, 2007
- CI #3 Letter from the Respondent to the Claimant, January 10, 2008
- CI #4 Letter from the Respondent to the Claimant, May 27, 2008
- CI #5 Letter from the Respondent, June 19, 2008
- CI #6 Estimate from Jay Dark, JJays Services, June 1, 2010
- CI #7 J & M Electrical Service proposal, March 30, 2009
- CI #8 Checks from the Claimant
 - Check #119 to J & M Electrical Service for \$660.00, March 30, 2009
 - Check #120 to J & M Electrical Service for \$660.00, April 3, 2009
 - Check #129 to J & M Electrical Service for \$330.00, May 15, 2009
- CI #9 Pepco Invoice, November 17, 2008
- CI #10 Estimate, May 9, 2009

CI #11 Photographs A through L

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

- Fund #1 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by certified mail to Respondent's home address, 2311 Knotweed Court, Brandywine, Maryland 20613, returned insufficient address; no such street
- Fund #2 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by first class mail, to Respondent's home address, 2311 Knotweed Court, Brandywine, Maryland 20613, returned insufficient address; no such street
- Fund #3 DLLR Licensing History, November 10, 2010
- Fund #4 Notice of Hearing, September 15, 2010, with the attached Hearing Order, August 24, 2010 by certified mail to Respondent's business address, 13801 Brandywine Road, Brandywine, Maryland 20813, signed green card, September 16, 2010
- Fund #5 Letter from MHIC to the Respondent, April 27, 2010

The Respondent did not offer any exhibits for admission.

PROPOSED ORDER

WHEREFORE, this 25th day of April 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.

Marilyn Jumalon

***Marilyn Jumalon
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION