

IN THE MATTER OF THE CLAIM OF
JUDY A. KIMBERLY
AGAINST THE
MARYLAND HOME IMPROVEMENT
GUARANTY FUND ON ACCOUNT OF
HOME IMPROVEMENT WORK
UNDERTAKEN BY
MARK D. POOLE, T/A
DECK & SIDING CATERERS LLC

* BEFORE STEPHEN J. NICHOLS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH NO.: DLR-HIC-02-10-39714
* MHIC NO.: 09 (05) 995
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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

This case arose because of a complaint filed by Judy A. Kimberly (Claimant) with the Maryland Home Improvement Commission (MHIC) against Mark D. Poole, t/a Deck & Siding Caterers, LLC (Respondent). The complaint asserts that the Claimant entered into a home improvement contract with the Respondent for the remodeling of the exterior of her residential property. The complaint alleges that the Respondent's performance of the work was unworkmanlike and incomplete.

On June 18, 2009, the Claimant filed a claim with the MHIC seeking to recover \$6,975.00 from the Home Improvement Guaranty Fund (Fund). On October 20, 2010, the MHIC issued an order for a hearing on the claim against the Fund.

On May 25, 2011, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The hearing was conducted at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. The Claimant appeared and represented herself. Hope M. Sachs, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. The Respondent failed to appear at the hearing.

On March 1, 2011, the OAH had mailed notice of the hearing to the Respondent by certified and regular mail to 12585 Indian Hill Drive, Sykesville, Maryland 21784, his last business address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2010).¹ The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned the certified mail to the OAH marked "Unclaimed." The U.S. Postal Service did not return the regular mail to the OAH. The Respondent's license with the MHIC expired on April 4, 2009. After the certified mail was returned, an investigator, acting for the MHIC, confirmed with the Motor Vehicle Administration (MVA) that the Respondent was a licensed driver in this State. As the Respondent is a licensed driver in this State, he is required to keep his address updated with the MVA. The Respondent's home address of record on file with the MVA is 12585 Indian Hill Drive, Sykesville, Maryland 21784.

¹ "The hearing notice to be given to the person shall be sent at least 10 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 Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter 'reached its destination at the regular time and was received by the person to whom it was addressed.'" *Bock v. Insurance Comm'r*, 84 Md. App. 724, 733, 581 A.2d 857, 861 (1990) quoting *Border v. Grooms*, 267 Md. 100, 104, 297 A.2d 81, 83 (1972), and *Kolker v. Biggs*, 203 Md. 137, 144, 99 A.2d 743, 746 (1953). Based on that presumption and that the regular mail was not returned to the OAH, the notice of hearing sent by the OAH to the Respondent is deemed to have been received by him at his last known address and provided him with notice of the instant hearing in a timely fashion.

"If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2010). Since notification requirements were met, the ALJ directed the hearing to proceed in the Respondent's absence.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern the 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, COMAR 09.08.02.01; COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland, and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following items were admitted into the record:

- Fund Exhibit #1 – Copy of a letter from the OAH to Legal Services, dated March 22, 2011, with attachments of a Notice of Hearing and a Hearing Order, returned as unclaimed, etc.
- Fund Exhibit #2 – Affidavit of William Banks, signed and dated May 24, 2011
- Fund Exhibit #3 – Department of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent, dated April 19, 2011
- Fund Exhibit #4 – Copy of a MHIC letter addressed to the Respondent, dated July 8, 2009, with a copy of a Home Improvement Claim Form, dated June 16, 2009
- Claimant Exhibit #1 – Copy of a Home Improvement Contract, dated January 29, 2008.
- Claimant Exhibit #2 – Copy of check, dated February 15, 2008, signed by the Claimant, for the amount of \$2,500.00
- Claimant Exhibit #3 – Photographs of a deck and roof, dated 2/2008, 03/2008 and 07/2008
- Claimant Exhibit #4 – Telephone call records for the Claimant (16 pages)
- Claimant Exhibit #5 – Copy of a receipt from the Beechwold Station Post Office, dated September 8, 2006, and a copy of a letter, dated September 8, 2008
- Claimant Exhibit #6 – Copy of the fax of an invoice to the Claimant from A & F Construction Services, dated December 3, 2008
- Claimant Exhibit #7 – Copy of a check signed by the Claimant, dated December 4, 2008 for the amount of \$1,928.00, with additional records of credit card charges

No other exhibits were offered into the record of the hearing.

B. Testimony

The Claimant testified in her own behalf. No other witnesses were called to testify.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license number 01-80054.
2. At all times relevant, the Claimant owned the residence located at 1833 Light Street, Baltimore, Maryland (the property).
3. On or about January 29, 2008, the Claimant and the Respondent entered into a home improvement contract for the Respondent to remodel the rear exterior of the residence at the property. The scope of the work included installing a new porch deck, building a handrail, replacing the porch roof, replacing the porch gutters, replacing the ground steps to the porch, installing brick patio pavers in the back yard, replacing the existing chain link fence with a wood fence and gate, and removing trash and debris.
4. The contract price for the home improvement work was \$7,430.00.
5. On February 15, 2008, the Claimant paid \$2,500.00 by check to the Respondent as a deposit for the work. The Respondent negotiated and cashed this check. In February 2008, after receiving the deposit, the Respondent commenced work on the home improvement project.
6. On March 4, 2008, after demolition work was completed and the new porch deck and the wood structure of the new porch roof had been rebuilt, the Claimant paid \$4,500.00 by check to the Respondent. The Respondent negotiated and cashed this check.
7. After the Respondent negotiated the \$4,500.00 check, he abandoned his work at the property. The last day the Respondent performed work at the job site was on or about March 10, 2008 (the day the Claimant's check cleared her bank).

8. Between March 22, 2008 and September 2, 2008, the Claimant telephoned the Respondent's business office no less than twenty times in order to convince him to resume work on the home improvement project. She left numerous voice mail messages that were not returned. On the few occasions when the Respondent answered the telephone, he told the Claimant that he was "getting to it" and would resume work, but he did not resume work as promised.

9. On September 8, 2008, the Claimant sent the Respondent a letter by certified mail demanding a return of \$2,000.00 from the Respondent and threatening him with court action. The Respondent failed to claim the certified mail that the Claimant had sent to him.

10. When the Respondent stopped working, the following deficiencies existed with the work that the Respondent was required to perform at the property:

- a. No footers had been installed as a foundation for the new porch.
- b. The wood structure of the new porch roof was not attached to the rest of the house at the property.
- c. No tar paper or shingles had been installed on the wood structure of the new porch roof.
- d. The new ground steps to the porch had not been installed.
- e. The handrail for the new porch deck and the ground steps had not been installed.
- f. The existing chain link fence had not been removed and the wood fence and gate had not been installed.
- g. Brick patio pavers had been placed in the back yard, but the installation was unworkmanlike as the pavers were not level, no sand had been placed between the pavers, and there was no border.
- h. Trash and debris had not been removed.

11. On December 3, 2008, the Claimant engaged A & F Construction Services, a MHIC licensed contractor, to repair and replace the items of poor work performed by the Respondent and complete the remodeling of the rear exterior of the residence at the property.

12. The fair market value of the cost to demolish the Respondent's work (where necessary), repair and replace the poor work performed by the Respondent and complete the remodeling of the rear exterior of the residence at the property as called for by the home improvement contract is \$7,405.00.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2010).² Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their "actual losses" from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(c)(1) (Supp. 2010). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2010). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

² Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

Recovery against the Fund is based on "actual loss" as defined by statute and regulation. "[A]ctual 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. "By employing the word 'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629, 691 A.2d 699, 706 (1997). "The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2). "At a hearing on a claim, the [Claimant] has the burden of proof." Md. Code Ann., Bus. Reg. § 8-407(e)(1).

The Respondent did not complete his obligations under the terms of the home improvement contract. After he had obtained almost the full contract price, the Respondent ceased working and abandoned his work leaving the home improvement project unfinished. After the work stopped, the Claimant telephoned the Respondent's business office many times in order to convince him to resume work on the home improvement project. She left numerous voice mail messages that were not returned. On the few occasions when the Respondent answered the telephone, he told the Claimant that he was "getting to it" and would resume work, but he did not resume work as promised. After approximately eight months of the Respondent's inactivity, the Claimant engaged A & F Construction Services, a MHIC licensed contractor, to demolish the Respondent's work (where necessary), repair and replace the poor work performed by the Respondent, and complete the remodeling of the rear exterior of the residence at the property. During the estimate process, A & F Construction Services had informed the Claimant that several items of the Respondent's work did not comply with local building codes. A & F Construction Services performed the correction and completion work at the property at a price of \$7,405.00. That amount is deemed to be the fair market value of the cost to repair and replace

the items of poor work performed by the Respondent and complete the remodeling of the rear exterior of the residence at the property.

Because the Claimant has successfully demonstrated that the Respondent's work as to eight items of work (Finding of Fact #10) required by the home improvement contract were unworkmanlike, inadequate or incomplete, she has established an entitlement to reimbursement on the claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:

(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 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)(a) does not apply to the facts as found. The Claimant did not present any evidence of "the value of any materials or services provided by the" Respondent at the property, so her claim cannot be measured under COMAR 09.08.03.03B(3)(b). As the first two possibilities are foreclosed, the ALJ will evaluate the instant claim of an "actual loss" in accordance with COMAR 09.08.03.03B(3)(c).

In order to determine the Claimant's actual loss from the evidence in this record, the following calculations need to be performed:

\$7,000.00	Payments made to the Respondent
+ <u>\$7,405.00</u>	Cost to repair, replace or complete the work
\$14,405.00	(Expenditure Subtotal)
- <u>\$7,430.00</u>	Original Contract Price
\$6,975.00	Actual Loss

The Claimant has an "actual loss" of \$6,975.00. Md. Code Ann., Bus. Reg. § 8-401. The Claimant, therefore, is entitled to reimbursement from the Fund in the amount of \$6,975.00.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has sustained an "actual loss" as a result of the Respondent's acts or omissions in the amount of \$6,975.00. Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is
RECOMMENDED that the Maryland Home Improvement Commission:

ORDER, that the Claimant be awarded \$6,975.00 from the Maryland Home Improvement Guaranty Fund to compensate her for "actual losses" sustained by the "acts and omissions" of the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER, that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further,

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

June 23, 2011
Date Decision Mailed
SJN:sn
#123263v1


Steph [redacted] Nichols
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
JUDY A. KIMBERLY	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMENISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	
HOME IMPROVEMENT WORK	*	
UNDERTAKEN BY	*	OAH NO.: DLR-HIC-02-10-39714
MARK D. POOLE, T/A	*	MHIC NO.: 09 (05) 995
DECK & SIDING CATERERS LLC	*	
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No other exhibits were offered into the record of the hearing.

PROPOSED ORDER

WHEREFORE, this 4th day of August 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.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION