

**IN THE MATTER OF THE CLAIM OF
CHARA PINA and JESSIE McGEE**

v.

**SEAN E. KELLEY,
t/a AMERIDECK**

**MARYLAND HOME
IMPROVEMENT COMMISSION**

MHIC CASE NO. 13 (90) 888

* * * * *

PROPOSED ORDER

**WHEREFORE, this 6TH day of April, 2016, Panel B of the Maryland Home
Improvement Commission ORDERS that:**

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.**
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:**

A) The Commission concludes that the correct regulatory formula for measurement of the Claimants' actual loss is set forth at COMAR 09.08.03.03B(3)(c). The regulation provides that, if the original contractor did work under the contract and the claimants have solicited another contractor to complete the contract, the claimants' actual loss shall be the amount that the claimants have paid to the original contractor, added to the amount paid to another contractor to complete the original contract, less the original contract price. Under COMAR 09.08.03.03B(3)(c), based on the facts found by the Administrative Law Judge, the measure of the Claimants' actual loss is as follows:

Amount paid to original contractor (Amerideck)	\$ 8,520.00
Amount paid to complete contract (Medallion)	<u>\$ 4,350.00</u>
	\$12,870.00
Less original contract price	<u>-\$12,870.00</u>
Actual Loss	\$ 0.00

B) COMAR 09.08.03.03B(3)(c) applies precisely to the facts of this case. The Claimants hired the original contractor to construct a deck. The Claimants paid a portion of the contract price to the original contractor, who failed to complete the contract. The Claimants then hired and paid a second contractor to complete construction of the deck. The total combined amount which the Claimants paid the original contractor and the second contractor equals the price (\$12,870.00) which the Claimants originally agreed to pay for a completed deck. Therefore, pursuant to the regulation, the Claimants have not proven an actual loss which is eligible for compensation from the Guaranty Fund.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimants' claim for compensation from the Home Improvement Guaranty Fund is DENIED.

4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney
Chairperson - Panel B
Maryland Home Improvement Commission

<p>IN THE MATTER OF</p> <p>THE CLAIM OF</p> <p>CHARA PINA and JESSIE McGEE,</p> <p>CLAIMANTS,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF SEAN E. KELLEY,</p> <p>d/b/a AMERIDECK,</p> <hr/> <p>RESPONDENT</p>	<p>* BEFORE LATONYA B. DARGAN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH Case No.: DLR-HIC-02-15-01499</p> <p>* MHIC Case No.: 13 (90) 888</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 28, 2014, the Claimants filed a claim against the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for actual monetary losses allegedly suffered as a result of the inadequate, incomplete, or unworkmanlike home improvement performed by Sean E. Kelley (Respondent), d/b/a Amerideck. On January 7, 2015, the MHIC ordered the Claimants should have a hearing to demonstrate eligibility for an award from the Fund.

On August 3, 2015, I conducted a hearing in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimants represented themselves. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. Neither the Respondent nor anyone authorized to represent the Respondent appeared. The Office of Administrative Hearings (OAH) issued a Notice of Hearing (Notice) to the parties at their addresses of record on May 14, 2015. The Notice advised the parties that a failure to appear could result in an adverse decision against the party failing to appear. The Respondent's copy of the Notice was not returned to the OAH as undeliverable by the United States Postal Service, and none of the parties requested a postponement of the hearing. As the Notice was issued well in advance of the hearing date, and the Respondent's copy of the Notice was not returned as undeliverable, I find the Respondent received notice of the hearing and he failed to appear. I conducted the hearing in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h); Md. Code Ann., State Gov't § 10-209 (2014); and, Code of Maryland Regulation (COMAR) 09.01.02.07.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), COMAR 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimants sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so,
2. What is the amount of the loss?

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted Claimant Ex. 1 on behalf of the Claimants and it consisted of the following documents:

- Complaint Form
- DLLR Active Licensee Search Information for Amerideck
- The Claimants' October 19, 2012 E-mail to the Respondent
- Copies of cancelled checks, paid to Amerideck on September 12, 2012 and October 4, 2012, each in the amount of \$4,260.00

- ~~Photographs~~
- Undated Home Improvement Claim Form
- MHIC's September 12, 2013 letter to the Claimants, with attached information about the claim filing process
- The Claimants' May 20, 2014 Home Improvement Claim Form

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1: Notice of Hearing, issued May 14, 2015
- Fund Ex. 2: DLLR's Transmittal to the OAH, with attached January 7, 2015 Order of MHIC
- Fund Ex. 3: The Respondent's licensing history
- Fund Ex. 4: MHIC's June 9, 2014 letter to the Respondent, with attached May 20, 2014 Home Improvement Claim Form

No exhibits were submitted on behalf of the Respondent.

Testimony

Chara Pina testified on behalf of the Claimants. The Fund did not present any witnesses.

No one testified on behalf of the Respondent.

PROPOSED FINDINGS OF FACT

1. At all relevant times, the Respondent was a home improvement contractor licensed by MHIC under registration number 45216.
2. On September 12, 2012, the Claimants entered into a contract with the Respondent for the Respondent to construct a new deck at their residence, located at 8509 Cedar Chase Drive, Clinton, Maryland (the Property). The total contract price was \$12,780.00.
3. Under the contract terms, the Respondent was to complete the deck construction within 45 days of when work commenced.
4. The Claimants made an initial deposit in the amount of \$4,260.00 on September 12, 2012. Under the contract, the Respondent was to begin work once the first installment was paid. The Respondent did not begin work until on or around October 4, 2012.
5. The Respondent completed the initial frame work for the deck, but he advised the Claimants he needed the second installment payment in order to purchase additional materials. The Claimants made a second payment of \$4,260.00 on October 4, 2012.
6. The Respondent performed some additional work on the deck between October 4, 2012 and October 10, 2012, to include laying some of the planks along a portion of the deck. After October 10, 2012, the Respondent did not report back to the Property and he was unresponsive to the Claimants' multiple attempts to reach him via telephone.
7. On October 19, 2012, Claimant Pina sent an e-mail to the Respondent in which she outlined the lack of progress on the project despite the Respondent having been paid

2/3rd of the contract price. The Respondent returned to the Property on that date to collect his tools, but neither he nor any of his subcontractors performed any further work on the deck.

8. As of October 19, 2012, the deck was not completed.
9. The Claimants subsequently contracted with Medallion, Inc. (Medallion) to complete the work on the deck. The Claimants paid Medallion the remaining balance under the contract the Claimants had with the Respondent. Medallion completed in approximately one week.

DISCUSSION

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); *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. The Claimants bear the burden of proof by a preponderance of the evidence to show entitlement to an award from the Fund. COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimants have proven eligibility for compensation.

There is no dispute the Respondent was a licensed home improvement contractor at the time the Claimants contracted with him to build a new deck for their residence. There is also no dispute the Respondent did not complete the work he was contracted to perform. The evidence demonstrates the Claimants made payments to the Respondent under the contract which totaled \$8,520.00; despite receiving 2/3rd of the contract price, the Respondent did not complete the work he was hired to perform. There were delays in the start of the work; it took approximately a month-and-a-half for the Respondent to commence work on the project, and he did not provide

the Claimants with any explanation for the delay. When the Respondent finally commenced work on the Property on October 4, 2012, he did approximately six days of work before leaving the project, again with no explanation to the Claimants for any delay. The Claimants made several attempts to contact the Respondent between October 10, 2012 and October 19, 2012 to ascertain the status of the project and when the Respondent planned to return, but he did not respond to any of their efforts to communicate with him. It was not until Ms. Pina sent an email on October 19, 2012, in which she laid out the deficiencies in the Respondent's performance thus far and indicated the Claimants were contemplating pursuing action against the Respondent with MHIC, did the Respondent respond. He picked up his equipment, but he did not perform any further work and he declined to refund the amounts the Claimants had already paid him. As of October 19, 2012, the deck was clearly not completed, a state visibly evident in the photographs. Sections of the decks were only framed out; planks had not been laid so anyone could actually walk across it. Quite simply, the Respondent abandoned the job with more than half of the job still not completed.

Having found that the Claimants are eligible for compensation, I now turn to the amount of the award. 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)(a), (b) and (c). 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).

Applying the formula set out above leads to the following result:

Amount Paid to the Respondent	\$ 8,520.00
Amount Paid to Correct or Complete Work	<u>+\$ 4,350.00²</u>
	\$12,870.00
Amount of Original Contract	<u>-\$12,870.00</u>
Amount of Actual Loss	\$ 0.00

The formula result is inadequate given the facts of this case. However, COMAR 09.08.03.03B(3) also provides that one of the formulas shall be used “[u]nless [MHIC] determines that a particular claim requires a unique measurement.” The Claimants paid the Respondent 2/3rd of the contract price and he performed less than half the required work before abandoning the job. In the hearing, the Claimants sought an award equal to the amount it cost to have Medallion complete the work, which was \$4,350.00. Under Business Regulation § 8-405(e)(5), the amount of an award to a claimant is limited to the amount the claimant paid the contractor whose work was inadequate, incomplete, or unworkmanlike. COMAR 09.08.03.03B(4) further clarifies that an award from the Fund may not be “an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.” Accordingly, as the Claimants seek an award that is less than the amounts they paid to the Respondent and which constitutes what it cost to complete the work, I recommend an award to the Claimants in the amount of \$4,350.00. COMAR 09.08.03.03B(3).³

² Ms. Pina testified the Claimants paid Medallion the remaining balance of the original contract price to complete the work.

³ Given the facts of this case and the formula result under COMAR 09.08.03.03B(3)(c), I find a unique measurement for the award from the Fund is appropriate, and I recommend the Commission award the unique measurement of the amount the Claimants paid to Medallion to complete the contract.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Claimants suffered an actual loss of \$4,350.00, and they are entitled to be compensated in the amount of \$4,350.00 as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(5); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$4,350.00; 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); and,

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

October 30, 2015
Date Decision Mailed

Signature on File



Latonya B. Dargan
Administrative Law Judge

LBD/kkc
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