

IN THE MATTER OF THE CLAIM
OF KENNETH J. ERICSON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ALISON
WHITACRE, T/A CORNERSTONE
BUILDERS, INC.,
RESPONDENT

* BEFORE DANIEL ANDREWS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-15-10870
* MHIC No.: 14 (05) 351
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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 10, 2014, Kenneth Ericson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,694.00 in alleged actual losses suffered as a result of a home improvement contract with Alison Whitacre t/a Cornerstone Builders, Inc. (Respondent).

I held a hearing on July 10, 2015 at the Department of Agriculture, located in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented

himself. The Respondent failed to appear for the scheduled hearing after proper notice to his address of record.¹ Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1 Revised Contract (Contract) between Claimant and Respondent, dated March 23, 2013, but signed by the parties on March 28, 2013
- Cl. Ex. 2 Several photocopied personal checks of payments made by the Claimant to the Respondent with dates ranging from April 2013 through July 2013
- Cl. Ex. 3 Several photographs of work performed by the Respondent
- Cl. Ex. 4 Contract Punch List, dated August 6, 2013

¹ On April 22, 2015, the OAH mailed a Notice of Hearing to the Respondent by certified mail to the Respondent's address of 3516 Newport Avenue, Annapolis, Maryland 21401. The Notice of Hearing informed the Respondent of the date, time and location of the scheduled hearing. On April 24, 2015, the Respondent signed a receipt indicating she received the Notice of Hearing. The hearing began as scheduled on July 10, 2015. After waiting for approximately fifteen minutes, neither the Respondent nor anyone representing the Respondent appeared for the hearing. Based on this record, I determined the Respondent had an opportunity to participate in the hearing, after proper notice, but failed to appear, and proceeded with the hearing in the Respondent's absence. Md. Code Ann., Bus. Reg. §8-312(h) (2015), COMAR 09.08. 03.03A(2).

- Cl. Ex. 5 Letter from the Respondent to Claimant, dated September 9, 2013
- Cl. Ex. 6 Letter from Claimant to Respondent, dated September 18, 2013
- Cl. Ex. 7 Two sealed envelopes with letter mailed by Claimant to the Respondent by certified mail, return receipt requested, on September 18, 2015, returned to the Claimant as "Unclaimed"
- Cl. Ex. 8 Change Order No. 1, dated April 3, 2013, Change Order No. 2, dated April 22, 2013, Change Order No. 3, dated August 3, 2013, and Revised Changer Order No. 3, dated, August 20, 2013
- Cl. Ex. 9 Proposals by other Contractors including JAX Construction, dated November 19, 2013, The Flooring Center, dated December 2, 2013, and Beers Flooring, dated September 20, 2013

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 OAH Notice of Hearing scheduled on July 10, 2015, mailed April 22, 2015
- Fund Ex. 2 MHIC Hearing Order, dated March 12, 2015
- Fund Ex. 3 Respondent's MHIC Licensing History, dated July 8, 2015
- Fund Ex. 4 Claimant's MHIC Claim Form, received by the MHIC on June 10, 2014
- Fund Ex. 5 MHIC letter to the Respondent, dated June 12, 2014

Testimony

The Claimant testified on his own behalf. There was no witness testimony presented on behalf of the Respondent or the Fund.

PROPOSED 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 license number 01 102323.
2. On March 28, 2013, the Claimant and the Respondent entered the Contract to improve the Claimant's residential home located at 1078 Carriage Hill Parkway, Annapolis, Maryland. 21401. The Contract price was \$34,280.00.

3. The relevant scope of work under the Contact included installing two layers of subfloor plywood with vapor barrier felt between layers, install plywood as necessary at the kitchen and corridor area, install new half inch by five inch pre-engineered Bellawood Maple flooring throughout the family room, addition, kitchen corridor, foyer, living room, and upstairs hallway, install new flooring and nosing on stairs after removal of existing treads, and install seven new wood floor registers.

4. On April 3, 2013, through Change Order No. 1, the parties agreed to install a different type of sliding glass door resulting in a credit of \$670.00 to the Claimant's original contract price.

5. On April 22, 2013, through a Change Order No. 2, the parties agreed to install a different type of windows, changed the flooring to Mullican Engineered Ridgecrest, with Aqua Bar underlayment, and install a new deck. The total change order cost was \$9,330.00.

6. On August 3, 2013, through Changer Order No. 3, the parties agreed remove and replace existing stairway with a new set of white oak box steps and treads, remove and patch drywall as necessary for the replacement of steps, and sand and finish the steps with sealer plus two coats of oil based polyurethane finish. The total change order was \$1,290.00.

7. The total contract price, including Change Order Nos. 1, 2, and 3 (excluding Revised Change Order No. 3) was \$44,230.00.

8. Based on an increase in the cost of the stairs, on August 20, 2013, through Revised Change Order No. 3, the total cost of the third change order increased to \$2,190.00.

9. From March 28, 2013 through July 3, 2013, the Claimant paid the Respondent a total of \$42,122.00.

10. The Respondent installed new hardwood stairs with noticeable gaps between the edge of the steps and the adjoining wall, new steps had noticeable damage in the wood, a shoe

print was left in the new finish, dry wall and doorways were left with damage caused by workers, and new flooring in the upstairs' hallway was installed with wood planks that were not level and contained noticeable damage.²

11. On July 11, 2013, in order to complete the contract and repair any work performed, through a contract punch list, the Respondent agreed to perform a number of final items, the most relevant of which included filling floor gaps, filling any remaining holes in flooring, sand and add fourth coat of finish to floor registers, re-varnish doorway thresholds, repair split at top of stairs, and touch up damaged paint on all walls, ceilings, and doors. The total value of all remaining contract items was \$1,475.00.³

12. After July 11, 2013, the Respondent did not perform the work described in the punch list.

13. On September 9, 2013, by letter from the Respondent to the Claimant, the Respondent confirmed that the Claimant did not want to proceed with the amended third change order due to the increased in cost. As a result, the Respondent returned Change Order No. 3 and Revised Change Order No. 3 as not being executed, including a \$400.00 deposit the Claimant paid to Respondent for the Revised Change Order No. 3.

14. Through the same letter, the Respondent informed the Claimant that the parties had reached an impasse to bring the project to a point that would leave the Claimant satisfied with the end result. For this reason, the Respondent also returned the contract punch list.

² See Claimant's Exhibit No. 3, photographs.

³ The punch list contains a specific cost for each item to be completed, the total cost of which is \$1,475.00. CL Ex. The document, however, indicates that the total cost was \$1,375.00, which appears to be a mathematical error in calculating the total cost of each specific line item.

15. On September 18, 2013, by letter from the Claimant to the Respondent, the Claimant informed the Respondent that he wanted the Respondent to complete the Contract including the change orders or he would consider the Respondent to have breached the Contract.⁴

16. The Respondent did not complete the contract or repair any work performed.

17. On November 19, 2013, the Respondent received an estimate from JAX Construction, to repair work performed by the Respondent or complete work required by the Contract, in the amount of \$2,425.00.

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) (2015). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401 (2015). For the following reasons, I find that the Claimant has proven eligibility for compensation.

In March 2013, the Respondent, a MHIC licensed home improvement contractor, and the Claimant entered into the Contract which required the Respondent to perform a home improvement of the Claimant’s home. The Contract’s original cost was \$34,280.00. The Claimant and Respondent also agreed to three change orders for additional home improvement work to be performed which increased the total contract cost to \$44,230.00. The Respondent began work under the Contract and, by July 2013, the Claimant had paid the Respondent \$42,122.00 towards the total contract cost.

⁴ The Claimant sent this letter to the Respondent by certified mail return receipt request, which were returned as unclaimed. CL Ex. 7.

By August 2013, the relationship between Claimant and Respondent deteriorated as the Claimant required the Respondent to make several repairs to work performed. On September 9, 2013, the Respondent notified that the Claimant that the parties reached an impasse and the Respondent would not be able to bring the project to a point where the Claimant would be satisfied. For this reason, the Claimant left the Contract incomplete, although to complete the Contract it would have required the Respondent to perform a punch list of items at a cost of \$1,475.00.

The focus of this case concerns work performed or not completed under the Contract including Change Order No. 3. In particular, the Respondent's work to install a hardwood floor in an upstairs hallway, installation of door thresholds, and installation of approximately ten hardwood steps. The Claimant presented photographs which demonstrated that step treads installed by the Respondent were not flush with an adjoining wall creating gaps the size of which a quarter could fit. Photographs also demonstrated that hardwood floor planks in an upstairs' hallway were not level or had damage caused by tools. Another photograph depicted damage to dry wall or doors which occurred while the Respondent was performing the Contract. Finally, another photograph demonstrated that a door threshold had not been installed.

The Respondent's proposed solution to repair the work performed or to complete the Contract, as described in the Punch List, was to fill the gaps or damaged hardwood with wood putty, sand, and re-varnish the affected areas, as well as install the door threshold. The Respondent also proposed to putty-fill, sand, and paint the affected drywall areas and door. The Respondent's proposed solution was offered through the Punch List which is dated July 11, 2013 and revised on August 3, 2013. The Respondent, however, did not perform any of the proposed work and left the Contract incomplete on September 9, 2013. After considering the Claimant's undisputed testimony regarding the work performed which was corroborated by photographic

evidence, I am satisfied by that the Respondent left the Contract incomplete and with home improvement work performed in an unworkmanlike manner. In a closing argument, the Fund, through its attorney, agreed that the work performed by the Respondent was unworkmanlike and incomplete. Thus, I find that the Claimant sustained an actual loss and is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. In order to complete the Contract or to repair the work performed by the Respondent, the Claimant sought several estimates from three home improvement contractors. On November 19, 2013, JAX Construction offered the least expensive proposal to repair the work performed or to complete the contract as it pertained to the upstairs' hallway floor, the hardwood steps, and the door threshold at a cost of \$2,454.00. The Fund contends that the JAX proposal is the most reasonable proposal to determine the amount of the Claimant's actual loss. The Claimant did not disagree and neither do I.

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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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 above formula, I conclude that the Claimant's actual loss is in the amount of \$317.00 and is calculated as follows:

Amount the Claimant paid to the Respondent	\$42,122.00
Plus amount to repair the work or complete Contract	<u>\$2,425.00</u>
	\$44,547.00
Minus Contract and Change Orders 1, 2, and 3	<u>-\$44,230.00</u>
Claimant's actual loss	\$317.00

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$317.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$317.00; 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 (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

October 8, 2015
Date Decision Issued

Daniel Andrews
Administrative Law Judge

DA/da
#158397

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of November, 2015, 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION