

CLAIM OF JOAN B. ABERNETHY * BEFORE WILLIAM SOMERVILLE,
 AGAINST THE MARYLAND HOME * AN ADMINISTRATIVE LAW JUDGE
 IMPROVEMENT GUARANTY FUND * OF THE MARYLAND OFFICE
 FOR VIOLATIONS ALLEGED * OF ADMINISTRATIVE HEARINGS
 AGAINST STEPHEN J. JOHNSON * OAH NO.: DLR-HIC-02-115-24686
 T/A * MHIC NO.: 14 (90) 629
 HELPING HANDS USA *

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 14, 2014, Joan B. Abernethy (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of funds for actual losses suffered as a result of home improvement work performed by Exin Solutions, Inc., trading as Helping Hands USA. The MHIC license holder for the corporation is Stephen J. Johnson (Respondent).

I held a hearing on October 20, 2015 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ Kris King,

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

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent represented himself.

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 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, 09.08.02.01, and 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence the following exhibits offered by the Claimant:

1. Contract document, 7-6-2013
2. E-mail thread
3. E-mail to Joan Abernethy/Jean Berry, dated 9-26-2015
4. Complaint form, 11-26-2013
5. Remedial contract document with attachments, 5-8-2014
6. E-mail thread, 11-2013
7. Inspection report, 5-6-2014
8. Electrical alteration permit, 5-16-2014
9. Report, undated
10. Packet of photographs, 11-2013
11. Notice of Violation, 5-9-2014
12. Packet of photographs

13. Packet of photographs
14. Note, with attachments, 4-14-2014
15. Packet of photographs
16. Remedial contract document, 9-10-2014
17. Packet of photographs
18. BBB complaint, 12-15-2013

The Respondent offered no exhibits.

I admitted into evidence the following exhibits offered by the Fund:

1. Hearing notice
- ~~2. Hearing Order~~
3. License history
4. Claim form
5. Letter, 1-13-2015
6. E-mail, 4-2-2015
7. Letter, 5-5-2015

Testimony

The Claimant testified and offered the testimony of William Gmeinwieser, a remedial contractor who was qualified to offer opinions in "kitchen remodeling."

The Respondent called no witnesses.

The Fund called no witnesses.

FINDINGS OF FACT

Upon considering demeanor evidence, testimony, and other evidence offered, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was the holder of an MHIC contractor license for Exin Solutions, Inc. (corporation) which trades as "Helping Hands USA."
2. On or about July 6, 2013, the corporation and the Claimant entered into a home improvement contract by which the corporation was to remodel the kitchen in the Claimant's residence and the Claimant was to pay \$23,000.00. The corporation was to do some minor demolition work, install a dedicated electrical circuit for a microwave oven, install some outlets, install a switch and six under-cabinet lights, install and plumb a new sink and faucet, install a garbage disposal and a waterline to a refrigerator, relocate a heat register, install appliances, install a "floating floor" and vapor barrier in the kitchen, hall and a closet, install a bulkhead, install custom kitchen cabinets 33 inches high and 12 inches deep "per plan," install a counter top "per plan," and paint the kitchen. The corporation also was to obtain permits and install a condensation line.
3. Thereafter, the contract was modified such that the corporation would install taller cabinets and fewer lights and the Claimant would pay an additional \$400.00.
4. On July 9, 2013, the Claimant paid the corporation \$8,066.00.
5. Work on the project began on or about July 26, 2013.
6. On August 21, 2013, the Claimant paid the corporation \$7,666.00.
7. On September 19, 2013, the Claimant paid the corporation \$6,668.00.
8. At no time did the corporation obtain the necessary electrical or plumbing permits as required by local code.

9. On October 25, 2013, because the project had not been completed, and no employee from the corporation had been at the site for several weeks, by e-mail the Claimant asked the Respondent to finish the project.
10. On November 26, 2013, the Claimant filed a complaint with the MHIC. The complaint focused upon the lack of required permits and various instances of what the Claimant alleged as poor workmanship.
11. On May 6, 2014, the Claimant had a meeting with county building inspectors; the project failed electrical and plumbing inspections.
12. On or about May 8, 2014, the Claimant asked a remedial contractor to inspect and to give an estimate to repair or remedy what the Claimant accurately alleged were instances of poor workmanship and items that failed inspections.
13. On or about May 8, 2014, the remedial contractor visited the site and observed the following contract items that were not done in a workmanlike manner:

Electric – electrical panel had to be moved out of the kitchen; under-counter lights needed to be re-wired with correct wire; an additional ground fault interrupter outlet needed to be installed; a 20-amp circuit needed to be added;

Plumbing – plumbing issues as pointed out by a plumbing inspector on May 6, 2014;

Cabinets – cabinets were not installed level or with sufficient room between the cabinets and the appliances (the dishwasher was installed by digging out drywall to make it fit) and the drywall bulkhead was not level;

Flooring – there were some gaps and buckling in the “floating” floor.
14. On May 8, 2014, the Claimant and the remedial contractor entered into a contract to repair and restore items listed above, other than the “floating” floor, for \$13,258.00.
15. That remedial work was done under county permits and the work passed inspection.

16. On September 10, 2014, the Claimant and the remedial contractor entered into another contract to repair the "floating" floor. The Claimant agreed to pay \$4,420.00 and the remedial contractor agreed to remove the flooring, level the subflooring, install a vapor barrier, and properly re-install the flooring with the necessary trim. The remedial contractor remedied the floor.
17. The Claimant paid the remedial contractor all of the money owed under the two contracts.
18. On or about May 1, 2014, the Claimant and the custom cabinet supplier previously used by the corporation entered into a contract. The Claimant was to pay \$948.70 and the custom cabinet supplier was to supply three kitchen cabinets, some crown molding, a certain cabinet door, and a side panel. All of those items were required to finish the project in a workmanlike manner. The Claimant paid that amount to the supplier.
19. On November 14, 2014, the Claimant filed a claim against the MHIC Fund.

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a). *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.

A claimant has the burdens of production and persuasion to establish the "inadequate, incomplete or unworkmanlike" work product of the contractor, as well as to establish the cost of the "actual loss." Md. Code Ann., Bus. Reg. § 8-407.

With regard to the burdens, a trier of fact can properly accept all, some, or none of the evidence offered. *Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341-43 (2004).

There is no dispute that the Respondent was the licensed home improvement contractor for the corporation at the time of the contract. (Finding of Fact 1.)

The Claimant alleges that much of the work was “unworkmanlike.” “Unworkmanlike” means not in a workmanlike manner. See *Webster’s New Universal Dictionary* 1984-88 (2d ed. 1983). The Court of Appeals has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952) the Court held, “The obligation to perform with skill and care is implied by law and need not be stated in any contract.” That rule was reaffirmed in *Worthington Constr. Co. v Moore*, 266 Md. 19, 22 (1972). In *K & G Constr. Co. v Harris*, 223 Md. 305, 314 (1960) the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the “workmanlike-manner” wording was equivalent to the “skill-and-care” wording in the *Gaybis* case.

In the instant case, the Claimant offered expert opinion evidence on what is required in the industry to meet the workmanlike manner standard. The witness, owner of Horizons Unlimited Home Improvements, Inc., testified persuasively and his opinions were well supported. He offered opinions on the lack of workmanlike performance on many items associated with the kitchen project. (Findings of Fact 11, 12, and 13.) In addition, some of the items about which the Claimant complains need no expert testimony to demonstrate the performance was unworkmanlike work in the industry, especially if the work does not satisfy local building codes. (See Claimant’s Ex. 15, 13, 12, 7.) Based upon the photographs, documents, opinion evidence, and fact-witness testimony, I can conclude that a substantial

portion of the kitchen remodeling project did not meet industry standards of skill and care. The Claimant has shown substandard work.

The Claimant has also shown that the subsequent work done by the remedial contractor was necessary in order to remedy the defects associated with the project.

The Claimant not only needs to prove the inadequate, incomplete, or unworkmanlike work product, but she must also prove the "actual loss." Md. Code Ann., Bus. Reg. § 8-401. "Actual loss" includes the cost to restore or repair. *Id.* In the instant case, the Claimant offered credible evidence of those costs. (Findings of Fact 14, 16, and 18.)

Having determined that the Claimant has shown that the Respondent is responsible for unworkmanlike, inadequate, or incomplete home improvement work with regard to the project, further analysis of an amount of "actual loss" is appropriate. 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). Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

(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 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 measurements accordingly.

COMAR 09.08.03.03B(3).

In the instant case, the third option is an appropriate measure of "actual loss." Based on the credible evidence offered, as described above, I calculate the Claimant's actual loss using the formula in COMAR 09.08.03.03B(3)(c) as follows:

\$22,400.00	paid toward original contract price
+\$18,626.70	cost to repair and complete poor work
<u>-\$23,400.00</u>	original contract price
\$17,626.70	actual loss

The "actual loss," as that term is defined in the statutory scheme, is \$17,626.70.

CONCLUSIONS OF LAW

I conclude that the Claimant has proven that she has sustained a compensable "actual loss" of \$17,626.70 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401.

PROPOSED ORDER

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

ORDER that the Claimant be awarded \$17,626.70 from the Maryland Home Improvement Guaranty Fund; and further

ORDER that the Respondent be deemed 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 Commission, Md. Code Ann., Bus. Reg. § 8-411; and further

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

January 15, 2016
Date Decision Mailed

WS/emh
#160277

Signature on File

William J.D. Somerville III
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 15th day of February, 2016, 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