

IN THE MATTER OF THE CLAIM	* BEFORE DANIEL ANDREWS,
OF RICHARD C. HOWLETT,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-46817
FOR THE ALLEGED ACTS OR	* MHIC NO.: 13 (05)1099
OMISSIONS OF	*
BRIAN HEMINGWAY, t/a ADEPT	*
CONSTRUCTION, INC.,	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
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CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On October 29, 2013, Richard C. Howlett (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of an actual losses allegedly suffered as a result of home improvement work performed by Brian Hemingway, t/a Adept Construction, Inc. (Respondent).

I convened a hearing on May 28, 2014, at the Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, Maryland, 21401. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). The Claimant represented himself. The Respondent failed to appear for

the hearing. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), MHIC, 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 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

### ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing scheduled for May 28, 2014, mailed to Respondent on March 21, 2014, with attached returned certificate of service as unclaimed and copy of the MHIC's Hearing Order, dated November 20, 2013
- Fund Ex. 2 MHIC Transmittal Form to the OAH with attached Home Improvement Claim Form, dated October 29, 2013
- Fund Ex. 3 MHIC Licensing History for Respondent, print dated April 1, 2014
- Fund Ex. 4 MHIC record of Respondent's mailing address of record, State Department of Assessment Taxation (SDAT) record of Respondent's residential property address, and Motor Vehicle Administration's (MVA) driving record and address for Respondent
- Fund Ex. 5 DLLR's letter to the Respondent, dated November 12, 2013, with attached Home Improvement Claim Form submitted by Claimant on October 29, 2013

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. 1 Contract between Claimant and Respondent (Contract), dated September 16, 2010

- Cl. Ex. 2 Architectural Design Plans, date stamped as approved by Anne Arundel County Department of Permits, November 10, 2010
- Cl. Ex. 3 Before and after photographs of Claimant's residence
- Cl. Ex. 4 Binder of documentation of money paid by the Claimant to the Respondent and various construction subcontractors or building supply companies
- Cl. Ex. 5 Chronology of events
- Cl. Ex. 6 Statement by Zachary Kreisman, President of Alco Products Company, regarding the status of Claimant's home improvement as of March 2011, dated October 22, 2011
- Cl. Ex. 7 List of work remaining to be completed after Respondent abandoned the project
- Cl. Ex. 8 Photographs of the Claimant's residence at the time the Respondent abandoned the project and after the home improvement was completed.
- Cl. Ex. 9 Bound records of money paid to other construction companies and building suppliers to complete the Claimant's home improvement
- Cl. Ex. 10 Separate copy of the Contract's specification page
- Cl. Ex. 11 Claimant's proposed actual loss claim

**Testimony**

The Claimant testified on his own behalf.

There was no testimony presented on the Respondent's behalf.

The Fund did not present any testimony.

**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 license number 01-76332.
2. The Respondent's personal and business address with the MHIC is 768 Old Herald Harbor Road, Crownsville, Maryland 21032 (address of record).

3. On October 2, 2010, the Claimant and Respondent entered into a contract to construct a detached garage with major exterior and interior renovations to the Claimant's residential property.

4. The Contract's total price was \$195,700.00.

5. On March 17, 2011, the Respondent began work on the Claimant's home improvement.

6. By June 15, 2011, the Respondent completed work on building the Claimant's detached garage and began to renovate the interior and exterior of the Claimant's existing home.

7. In November 2011 the Respondent began to work sporadically on the Claimant's home improvement. At the time, the Respondent claimed he was out of money and could no longer continue with the home improvement project. The Claimant, however, was desperate to get the work completed and paid the Respondent more money.

8. The Respondent continued to work sporadically on the Claimant's home improvement through December 2011, January, February and March 2012.

9. The Respondent's work crews began to not show up to perform work at the Claimant's residence. The Claimant would make telephone calls to the Respondent to see why no workers were working but these telephone calls went unanswered.

10. Even though the Respondent still had work to perform under the Contract, the Claimant noticed that the Respondent or his subcontractors were removing work tools from the work site.

11. March 16, 2012, was the last day the Respondent performed any work on the Claimant's home improvement. After this date, the Respondent stopped coming to the work site to do any work despite the Claimant's calls to the Respondent to inquire about his return to the site.

12. By March 2012, the Claimant directly paid the Respondent a total of \$221,200.00.

13. The Claimant also made several direct payments to building supply companies and the Respondent's subcontractors in the total amount of \$66,393.86.

14. As of March 2012, the Claimant paid the Respondent, building suppliers, and subcontractors a total of \$287,593.86.

15. As of March 2012, the remaining work under the Contract included:

- Complete rear second floor porch
- Install and finish interior drywall
- Install interior hardwood flooring
- Install two showers
- Install kitchen cabinets and counter tops
- Install wet bar, sink, and countertop
- Install four bathroom vanities
- Build pantry shelf
- Paint all interior walls, ceiling and trim
- Install interior doors and hardware
- Install gutters and downspouts
- Center the front door and add front concrete steps
- Top front stoop with brickwork
- Finish all electrical work
- Finish all plumbing work
- Installing drywall in the main house
- Paint all newly renovated areas
- Install trim to match existing trim
- Install flooring and tile

16. After the Respondent abandoned the Contract, from April 2012 through June 2012, the Claimant paid several contractors a total of \$42,382.16 to complete the home improvement work. The Claimant paid Custom Wood Floors, Inc., \$11,211.16, Mid-Atlantic Deck and Fence Co., Inc., \$9,156.00, Cimielli's Landscape Services, \$2,645.00, and Alco Products Co., Inc., \$19,382.16.

17. On October 29, 2013, the Claimant submitted a claim with the MHIC seeking reimbursement for an actual loss due to the Respondent's failure to complete the home improvement contract.

18. On November 12, 2013, the MHIC mailed the Claimant's MHIC claim to the Respondent, using his address of record.

19. On March 21, 2014, the OAH mailed a Notice of Hearing (Notice) to the Respondent by certified and regular first-class mail, using his address of record with the MHIC.

20. The Respondent's address of record is also the same address which the SDAT and the MVA have on record for the Respondent.

21. The Notice informed the Respondent that a hearing on the Claimant's claim against the Fund was scheduled for May 28, 2014, at 10:00 a.m. and will be held at the Department of Agriculture, located at 50 Harry S. Truman Parkway, Annapolis, Maryland.

22. The Notice mailed by certified mail was returned by postal authorities as unclaimed. The Notice mailed by regular first-class mail was not returned by postal authorities.

## DISCUSSION

### Respondent's Failure to Appear

Section 8-312 of the Business Regulation Articles provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a) (Supp. 2013). On March 21, 2014, the OAH sent a Notice by certified and regular first-class mail to the Respondent's address of record with the MHIC. The Notice advised the Respondent of the date, time, and place of the hearing. A receipt for the Notice delivered by certified mail was returned by the U.S. Postal Service (USPS) indicating the Notice was unclaimed by the Respondent. The Notice mailed to the Respondent by regular first-class mail was not returned by the USPS.

On May 28, 2014, I convened the hearing in accordance with the Notice. The Respondent, however, failed to appear for the hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear.

The record reflects that the Respondent's address of record with the MHIC is also the current address of record for the SDAT and the MVA. Using the Respondent's address of record, the Respondent was mailed a Notice which informed him of the hearing date, time and location. Although the Notice mailed by certified mail was not claimed by the Respondent, the Notice sent by regular first-class mail appears to have been properly delivered to the Respondent. For these reasons, I conclude that the Respondent was properly notified of the hearing and given an opportunity to participate but failed to appear. Accordingly, I found it appropriate to proceed in the Respondent's absence.

#### Merit of Claimant's Claim

A homeowner 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) (Supp. 2013). *See also* COMAR 09.08.03.03B(2). A contractor may not abandon or fail to perform, without justification, a home improvement contract. Md. Code Ann., Bus. Reg. § 8-605 (2010). An "actual loss" is defined as "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).

Without dispute, the Claimant established that, on October 2, 2010, he entered into a home improvement contract with the Respondent to build a detached garage and perform major exterior and interior renovations of the Claimant's residential property. The total contract price was \$195,700.00. The Respondent began the home improvement work in March 2011 and completed construction of the detached garage by June 2011. From June through November

2011, the Respondent worked to renovate the exterior and interior of the Claimant's existing home. By November 2011, however, the Respondent's work was sporadic and he eventually told the Claimant that he could no longer complete the project because he had run out of money. The Claimant, unfortunately, was desperate to get the project completed and he continued to pay the Respondent, building supply companies, and the Respondent's subcontractors. Nevertheless, the Respondent or his subcontractors worked sporadically from November 2011 through March 2012 and eventually the Claimant noticed that tools were being removed from the work site. The Claimant would also often call the Respondent to see when he or his subcontractors would return to work but these telephone calls went unanswered. Eventually, the last day the Respondent did any work at the Claimant's home was March 16, 2012 and he has never returned to the work site. As of March 2012, the Claimant had paid the Respondent, building supply companies, or subcontractors a total of \$287,593.86. Even though the Respondent had been paid significant money, more work, as described in finding of fact number 15, remained to be performed in order to complete the home improvement contract. Consequently, the Claimant was forced to hire several other contractors to complete the home improvement. From April through June 2012, the Claimant paid Custom Wood Floors, Inc., Mid-Atlantic Deck and Fence Co., Inc., Cimielli's Landscape Services, and Alco Products Co., Inc. a total of \$42,382.16.

As the Business Regulation Article provides, a contractor may not abandon or fail to perform, without justification, a home improvement contract. Md. Code Ann., Bus. Reg. § 8-605 (2010). It is undisputed that the Respondent entered into a home improvement contract with the Claimant and abandoned that contract on March 16, 2012. The uncontested evidence established that the Respondent abandoned the contract effectively in November 2011 because he could not afford to continue working without being paid more money by the Claimant. Even though the Claimant continued to pay the Respondent, the Respondent's subcontractors and



Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2013). Because the Claimant's actual loss exceeds the \$20,000.00 maximum award, I recommend that the Fund award the Claimant for an actual loss sustained in the amount of \$20,000.00.<sup>1</sup>

**CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained a compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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) (2010); and

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

**Signature on File**

August 26, 2014  
Date Decision Issued

\_\_\_\_\_  
Daniel Andrews  
Administrative Law Judge

DA/da  
# 144590

<sup>1</sup> The governing statute provides that the "[MHIC] may not award . . . more than \$20,000.00 to one claimant for acts or omissions of one contractor . . ." The MHIC's regulations provide that it may not award more than \$15,000.00 in such circumstances. Compare Md. Code Ann., Bus. Reg. § 8-405(e)(1)(Supp. 2013) with COMAR 09.08.03.03D(2)(a). The difference between the statute and the regulation constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Balt. Cnty.*, 414 Md. 265, 276 (2010).

building supply companies, the Respondent only worked sporadically and eventually stopped working by March 16, 2012, without any justification, and abandoned the home improvement contract. When the Respondent abandoned the Contract he left significant portions of the home improvement incomplete which required the Claimant to hire other contractors to complete the Contract. The Fund did not contest the Claimant's evidence and agrees with this position. Accordingly, I am satisfied that the Claimant established a compensable actual loss because of the Respondent's omission or, in this case, abandonment, of the home improvement. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2013). See also COMAR 09.08.03.03B(2).

Having found eligibility for compensation, I now turn to the amount of the award, if any. Unless a particular claim requires a unique measurement, the MHIC shall determine a claimant's actual loss using one of the formulas found in COMAR 09.08.03.03B(3). Since the Claimant paid the Respondent for work performed and paid other contractors to complete the work, COMAR 09.08.03.03B(3)(c) is the appropriate formula and provides:

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.

Using the above formula, I have determined the Claimant's actual loss to be \$134,276.02 as shown below:

Amount paid to the Respondent:	\$287,593.86
<u>Plus amount paid to contractors to complete:</u>	<u>\$ 42,382.16</u>
	\$329,976.02
<u>Minus the original contract price:</u>	<u>\$195,700.00</u>
<b>Actual Loss:</b>	<b>\$134,276.02</b>

The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann.,

PROPOSED ORDER

*WHEREFORE, this 26th of September 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.*

*W.M. Bruce Quackenbush, Jr.*  
*William Bruce Quackenbush, Jr.*  
*Panel B*

**MARYLAND HOME IMPROVEMENT COMMISSION**