

IN THE MATTER OF THE CLAIM	* BEFORE JOHN T. HENDERSON, JR.
OF ANDREW T. CHUDY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-27715
FOR THE ALLEGED ACTS OR	* MHIC NO.: 10 (75) 1332
OMISSIONS OF	*
NOAH MATTEN, T/A MATTEN	*
CONSTRUCTION, LLC	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 8, 2011, Andrew T. Chudy (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$21,351.00¹ for actual losses allegedly suffered as a result of a home improvement contract with Noah Matten, t/a Matten Construction, LLC. (Respondent).

I held a hearing on February 25, 2013 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland 21031. Hope M. Sachs, Assistant Attorney

¹ At the hearing, the Claimant amended his claim and sought \$36,074.17 as reimbursement from the Fund.

General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant represented himself. The Respondent did not appear.

On October 3, 2012, the OAH mailed notice of the hearing to each of the parties, including the Respondent, by certified and regular mail to 331 S. Robinson Street, Baltimore, Maryland 21224, and an alternate address of P.O. Box 6082, Baltimore, Maryland 21231, his last known addresses of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2010 & Supp. 2012).² The notice advised the Respondent of the time, place, and date of the hearing. On or about October 16, 2012 and October 26, 2012, the United States Postal Service (USPS) returned the mail addressed to the Respondent as being not deliverable as addressed. On October 26, 2012, a second notice was mailed to the Respondent at another address provided by DLLR: 305 North Street, Easton, Maryland 21601. On or about November 8, 2012, the USPS returned the mail addressed to the Respondent at the Baltimore address provided by DLLR as being unclaimed. On or about November 28, 2012, the USPS returned the mail addressed to the Respondent at the Easton address provided by DLLR as being unclaimed.

Since the notice of the hearing was sent to the Respondent at his addresses of record with the MHIC within the required time and no forwarding order or other correspondence from the Respondent was provided to identify alternative addresses, I determined that the Respondent was properly notified but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern procedure in this case.

² "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).

Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), 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 the Respondent's acts or omissions?
2. If so, how much is the Claimant entitled to receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted Claimant's exhibit 1 which included sub-sections, as follows:

- A. Sixteen photos of subject property
- B. Contract dated April 28, 2009 between Respondent and Claimant
- C. Change Order Forms dated January 6, 2009, October 16, 2009 (3), January 9, 2010 (4) and October 16, 2009
- D. Letters dated March 11, 2010, March 16, 2010, April 28, 2010 and May 5, 2010 from the Claimant to the Respondent
- E. Letter dated May 26, 2010 from David F. Clinnin, Esquire to the Respondent
- F. Copies of checks listed by check number as follows:

1121, 1122, 1137, 101, 102, 1132, 1134, 1005, 1016, 232, 240, 239, 1004, 138, 1133, 242, 204, 103, 104, 105, 107, 108 110, 205, and 207
- G. Invoice dated June 8, 2010 from Mike Stavros, Plumbing Services; building permit no. COM2009-24618 issued October 21, 2009; invoice dated January 17, 2010 from Hutton Mechanical Contractors; invoice dated September 25, 2009; proposal dated May 17, 2010 from All Temp Heating & Air Conditioning, Inc.; contract/invoice dated September 21, 2009 from Hampton Electrical Services, Inc.; extra work order/invoice dated December 23, 2009, from Hampton Electrical Services, Inc.; building permit no. COM2009-22252 issued September 23, 2009; building permit no. COM2009-24618 issued on October 21, 2009; and building permit no. COM2009-22252 issued on September 23, 2009

- H. Letters to Bank of America from the Claimant dated January 7, 2010, March 18, 2010; letter dated February 8, 2010 from Bank of America to the Claimant; letters to Bank of America from the Claimant dated November 10, 2009, March 18, 2010, January 7, 2010, and March 18, 2010
- I. Letter dated May 21, 2010 from HIC to the Respondent; letter dated September 16, 2010 from HIC to the Claimant; letter dated October 19, 2010 from HIC to the Claimant; Letter dated July 13, 2011 from HIC to the Respondent; letter dated February 3, 2012 from HIC to the Claimant

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

- Fund Ex. 1 - OAH memo dated October 26, 2012; Notice of Hearing dated October 3, 2012; HIC Hearing Order dated June 25, 2012
- Fund Ex. 2 - OAH memo dated October 16, 2012; Notice of Hearing dated October 3, 2012; HIC Hearing Order dated June 25, 2012
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- Fund Ex. 5 - Affidavit of Thomas Marr, IV, dated October 26, 2012 with MVA driving record of Respondent
- Fund Ex. 6 - DLLR/HIC I.D. Registration (License) of Respondent
- Fund Ex. 7 - Letter dated July 13, 2011 from HIC to the Respondent with the Claimant's claim form dated March 2, 2011

Testimony

The Claimant testified on his own behalf.

There was no testimony presented on behalf of the Fund.

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 01-96943.

2. On April 28, 2009, the Claimant and the Respondent entered into a contract to totally renovate and rehabilitate the Claimant's home at 1468 William Street, Baltimore, Maryland 21231.³ The Respondent agreed to furnish the materials and labor, unless otherwise specified, and specifically, the Respondent agreed to do the following work:

1.	Obtain all required permits from Baltimore City	\$ 800.00
2.	Dumpsters/trash removal	\$ 2,600.00
3.	Demolition	\$ -0-
4.	Structural Repairs	\$ 4,200.00
5.	Roofing	\$ 1,400.00
6.	Exterior Masonry	\$ 4,900.00
7.	Framing	\$ 5,600.00
8.	Windows	\$ 5,950.00
9.	Exterior doors	\$ 1,200.00
10.	HVAC	\$ 9,500.00
11.	Electrical	\$ 8,800.00
12.	Plumbing	\$ 11,500.00
13.	Insulation	\$ 3,100.00
14.	Paint	\$ 1,400.00
14a.	Interior	\$ -0-
14b.	Exterior	\$ 1,400.00
15.	Deck	\$ <u>6,000.00</u>
	Total	\$ 68,350.00

3. The total contract price was \$68,350.00.⁴ A deposit of \$8,600.00 was due at the start of the job to commence the work. The balance was placed into a non-interest bearing escrow account to be drawn according to a budget and a third party agent conducting the draw inspections who had the sole authority as escrow agent to release funds.

4. The Respondent, through sub-contractors, began work in June of 2009.

5. The house was gutted and framed by the sub-contractors who did the demo, heavy plumbing and electrical remodeling.

³ At that time, the Claimant co-owned the property with Matthew Falkowski and Timothy Gehring.

⁴ The attachment A, scope of work within Exhibit 1B totaled the contract price to be \$66,950.00 which was computed in error within the document.

6. The Claimant and the Respondent agreed upon change orders which increased the contract price, as follows:

<u>Date</u>	<u>Description of Changes</u>	<u>Cost</u>
October 16, 2009	Addition of 11 can lights	\$ 1,089.00
	One dedicated circuit for owner supplied and installed tile heating system	\$ 470.00
	Addition two piece half bath on first floor	\$ 2,200.00
	Rough in on existing second floor bath due to unusable waste/supply lines	\$ 980.00
	Addition of third floor door and new basement doors	\$ 2,000.00
	Wire Central VAC system	\$ 480.00
	One dedicated circuit (second floor bath)	\$ 470.00
	Install dedicated circuit in metal Conduit for TV in living room	\$ 295.00
	Install can light under first floor Staircase	\$ 95.00
	Demo existing cans (2) in dining Room	\$ 185.00
	Install Cat5/rg6 cable/internet	\$ 295.00
	Install receptacle for roof deck	\$ 235.00
	Install (3) new 4" cans for master bath	\$ 345.00
	T&M for work damaged by other	\$ 450.00

January 9, 2010	Cut hole in north kitchen party wall 18" x 12" with lenthil to accommodate New range hood exhaust	\$ 750.00
	Install new waste and over flow for Second floor rear bath	\$ 210.00
	Purchase new shower valve third floor bath	\$ 175.00
	Install new hood and vent in kitchen	\$ 325.00
	Move two fart fans	\$ 275.00
	Reframe half bath	<u>\$ 530.00</u>
	Total Change Orders	\$11,854.00

7. The Change Orders increased the contract price by \$11,854.00 for a total contract price of \$80,204.00.⁵

8. As identified within Finding of Fact No. 2 herein, the Respondent did not complete line items 2, 9, 14, 15 or 8 as agreed upon within Attachment A of the contract. In addition, he only completed seventy percent of line items 10, 11 and 12.

9. As a result of the Respondent not completing the agreed upon work, the Claimant disputed the Respondent's billed amount of \$80,204.00. The Claimant made effort to negotiate with the Respondent seeking reductions of \$5,950.00 for windows the Claimant accepted responsibility for replacing, \$2,200.00 for an error concerning the powder room, and \$6,000.00 for the roof deck that was not constructed by the Respondent. As a result of the reductions from the total contract price of \$80,204.00, the Claimant agreed to pay for work totaling \$66,054.00 which is the final contract price to complete the work.

⁵ The Claimant testified that the Change Orders totaled \$17,854.00, a difference of \$6,470.00. The Change Orders presented within Exhibit 1C totaled \$11,384.00. Credit was not given for undocumented changes totaling \$6,470.00.

10. As of March 30, 2010, the Claimant paid the Respondent a total of \$72,400.00, which includes the down payment of \$8,600.00 paid on April 24, 2009; \$10,900.00 paid on August 18, 2009 and cash of \$500.00 paid in October 2009.⁶

11. During the course of the work, the Claimant learned that the sub-contractors were not being paid after they submitted invoices to the Respondent for work performed. The Claimant made effort to contact the Respondent by telephone and/or email without success to discuss the sub-contractors not receiving payment.

12. The bank provided a mediator to assist in resolving particular issues between the Claimant and the Respondent. The mediation did not occur.

13. The Claimant wrote the Respondent on March 11 and 16, 2010; April 28, 2010; and May 5, 2010. The letters disputed billed amounts, sought the status of the work, expressed disappointment with the Respondent missing required completed task deadlines and sought a refund for default of contract. The Claimant last heard from the Respondent after the final payment was made on or about March 30, 2010.

14. The May 5, 2010 letter the Claimant sent the Respondent demanded a refund of \$19,010.86 for incomplete construction work.

15. On May 26, 2010, the Claimant authorized an attorney to send to the Respondent a demand for a refund of \$19,010.86. The Respondent did not respond to the demand of the attorney, did not refund any money, nor further communicated with the Claimant.

16. The unfinished work consisted of removing eight feet of construction debris from the outside property, completion of structural repairs, completion of the exterior masonry work,

⁶ These payments did not appear within Exhibit 1F which totaled payments of \$59,570.00. The Claimant testified that the payments were made. There was no presentation of canceled checks or receipts to corroborate those payments; nevertheless, I find the testimony credible.

completion of wall framing, installation of the HVAC systems, completion of the electrical wiring and circuits, completion of the plumbing rough-ins and installations, replacing exterior doors and painting.

17. The Claimant secured new contractors to complete the rehabilitation project at a cost of \$15,834.17.⁷

18. The Claimant is making a claim from the Fund for \$36,074.17.⁸

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 actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2009 & Supp. 2012).⁹ Under this statutory scheme, licensed contractors are assessed fees which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for 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(e)(1) (Supp. 2012). 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. 2012). When the Fund pays money to a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated

⁷ This sum is corroborated within Exhibit 1G.

⁸ The Claimant computed the sum of \$20,240.00, representing his claimed refund plus \$15,834.17 which represented the sum paid to complete the work in support of his claim for this amount.

⁹ Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

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 reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

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 (1997). “The Fund may only compensate [claimants] for actual losses 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 performed a home improvement which was the total renovation and rehabilitation construction of the Claimant’s home. For the following reasons, I find that the Claimant has proven an actual loss making him eligible for compensation.

First, there is no dispute that the Respondent held a valid contractor’s license in 2009, when he entered the Contract with the Claimant. There is also no dispute that the Claimant is an owner and that there is no procedural impediment barring him from recovering from the Fund (too many homes owned, a family relationship to the Respondent, etc.) Md. Code Ann., Bus. Reg. § 8-405(f) (Supp. 2012).

Second, the Respondent performed an inadequate and incomplete home improvement regarding the renovation and rehabilitation construction of the Claimant’s home. He essentially abandoned the contract. He did not complete line items 2, 9, 14, 15 or 8 as listed within

Attachment A of the contract and he only completed seventy percent of line items 10, 11 and 12. This resulted in the Claimant having to secure other contractors to complete work that was not performed.

As a result of the Respondent abandoning the project and failing to pay sub-contractors, the Claimant made effort to request the Respondent return to complete the work as well as pay the sub-contractors. The Respondent never returned the Claimant's telephone calls, never responded to his letters and never returned to his home to complete the work after March 30, 2010. The claim filed by the Claimant is legally sufficient.

I find that the Respondent performed unworkmanlike, inadequate, and incomplete work. As such, I find that the Claimant has sustained his burden and has shown an actual loss. Having found eligibility for compensation, I now turn to the amount of the award, if any.

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) 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 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)(a) does not apply to the facts as found, as the Respondent did some work on the property through his sub-contractors. The claim cannot be measured under COMAR 09.08.03.03B(3)(b). In addition, COMAR 09.08.03.03B(3)(b) does not apply to the facts as found since the Claimant solicited other contractors to complete the contract. As the first two possibilities are foreclosed, I 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 apply:

\$ 72,400.00	Payments made to the Respondent by Claimant
<u>\$ 15,834.17</u>	Cost to repair, replace, or complete the work
\$ 88,234.17	(Expenditure Subtotal)
<u><\$ 66,054.00></u>	Less the original contract price (Findings of Fact 9 herein)
\$ 22,180.17	Actual Loss

The Claimant has an "actual loss" of \$22,180.17. Md. Code Ann., Bus. Reg. § 8-401; § 8-405(a). The MHIC may not award from the Fund more than \$20,000.00 to one claimant for acts or omissions of one contractor or an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2012). Since the claim exceeds the limit, the fund award is limited to \$20,000.00.

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); Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2011); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Claimant sustained an actual loss; and


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 he 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

May 28, 2013
Date Decision Mailed

John T. Henderson, Jr. 
Administrative Law Judge

JTH/rbs
142460

IN THE MATTER OF THE CLAIM	* BEFORE JOHN T. HENDERSON, JR.
OF ANDREW T. CHUDY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
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FILE EXHIBIT LIST

Exhibits

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- A. Sixteen photos of subject property
- B. Contract dated April 28, 2009 between Respondent and Claimant
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PROPOSED ORDER

WHEREFORE, this 28th day of June 2013, 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