

**IN THE MATTER OF THE CLAIM  
OF FIVE OCEANS, INC.**

**MARYLAND HOME IMPROVEMENT  
COMMISSION**

**AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ACTS OR OMISSIONS  
OF MICHAEL BAKER T/A  
BAKER'S HOME IMPROVEMENTS**

**MHIC CASE NO. 15(05)949  
OAH CASE NO. DLR-HIC-02-16-37551**

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**FINAL ORDER**

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on May 17, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on August 2, 2017, concluding that the homeowner Five Oceans, Inc. ("Claimant") sustained an actual and compensable loss of \$9,243.48 as a result of the acts and omissions of the contractor Michael Baker t/a Baker's Home Improvements ("Contractor"). *ALJ Recommended Decision* p. 19. In a Proposed Order dated September 12, 2017, the Maryland Home Improvement Commission ("MHIC") affirmed the Recommended Decision of the ALJ to award the Claimant \$9,243.48 from the MHIC Guaranty Fund. The Claimant subsequently filed exceptions of the MHIC Proposed Order.

On January 18, 2018, a hearing on the exceptions filed in the above-captioned matter was held before a two- member panel ("Panel") of the MHIC. Present on behalf of the Claimant, was Barbara Donlon part owner of Five Oceans, Inc. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. Despite receiving proper notice, the Contractor did not appear for the hearing.

Pursuant to Maryland Annotated Code, Business Regulation Article ("BR") §8-313(b), a hearing panel of the Commission is to consist of three Commission members. The panel must also contain at least one member who has experience in some phase of the business of home improvement, and at least one consumer member. The consumer member scheduled to

participate in this hearing did not appear. At the outset of the hearing the Claimant was asked whether they wished to proceed with a hearing panel consisting of only two members, both of whom were engaged in the business of home improvement, or have their hearing postponed so that a full three-member hearing panel could be present to hear the case. The Claimant agreed to proceed with the two-member panel.

The initial matter addressed by the Panel at the exceptions hearing was a request to admit additional evidence submitted by the Claimant. The test that must be met in order to admit additional evidence at an exceptions hearing is found at Code of Maryland Regulations ("COMAR") 09.01.03.09K, under which a party must prove that the additional evidence: (1) Is relevant and material; (2) Was not discovered before the ALJ hearing; and (3) Could not have been discovered before the ALJ hearing with the exercise of due diligence. The Claimant was given the opportunity to present oral argument regarding their request for the admission of additional evidence. The Claimant sought to admit an extensive list of expenses that was provided to their attorney prior to the OAH hearing but was not offered into evidence at that time. The Panel found that the Claimant had not met the test under COMAR 09.01.03.09K because these documents were in the possession of the Claimant's attorney who chose not to introduce them at the hearing below. After denying the Claimant's request to present additional evidence, the Panel allowed the Claimant to present further argument as to why the ALJ's decision should be overturned.

The main argument raised by the representative for the Claimant was that she did not understand the ALJ's calculation of an award of \$9,243.48, when she claims that they had paid a total of approximately \$80,000 to the original Contractor and subsequent contractor's to complete the job. COMAR 09.08.03.03B(3) sets forth three formulas for the measurement of a

claimant's actual loss. Because some work was performed by the Contractor in this case and the Claimant sought subsequent contractors to correct and complete the work, the ALJ correctly used the third formula to measure actual loss which reads as follows:

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). Based on the evidence submitted by the Claimant, the ALJ found that a total of \$43,850.00 was paid to the original Contractor. *ALJ Recommended Decision* p. 18.

The ALJ then calculated the "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 gave the Claimant credit for \$7,500.00 that they paid to subsequent licensed contractors to correct or complete the work, \$9,850.00 for the payments that remained to be paid to subsequent contractors, and \$6,318.48 for materials that the Claimant purchased that should have been supplied by the original Contractor. COMAR 09.08.03.03B(3)(c); *ALJ Recommended Decision* p. 18. The total cost to repair and complete the work was found to be \$23,668.48. *ALJ Recommended Decision* p. 18.

The ALJ purposely did not include in his calculation of the reasonable cost to repair and complete the \$10,212.89 the Claimant paid the unlicensed contractor DLI to complete painting, kitchen and bathroom renovation work. *ALJ Recommended Decision* p. 16-17. In his decision, the ALJ correctly cites the MHIC's practice of not awarding from the Fund for subsequent work

completed by an unlicensed contractor. *ALJ Recommended Decision* p. 16-17. The Fund is generated by fees collected from home improvement contractors licensed by the State of Maryland. BR §8-404. The statute governing the Fund limits recovery to claims against licensed contractors. BR §8-405(a). It is also a misdemeanor to act or offer to act as a home improvement contractor without a license. BR §8-601(a)-(c). As a result, it is the long held practice of the MHIC to not reimburse a claimant for money paid to an unlicensed home improvement contractor to correct or complete work performed that is the subject of the claim. Therefore, the ALJ correctly did not include the \$10,212.89 paid by the Claimant to an unlicensed contractor in his calculation of actual loss. *ALJ Recommended Decision* p. 16-17.

The sum of the amount paid to the original Contractor, \$43,850.00, and the reasonable cost to repair and complete the work, \$23,668.48, equals \$67,518.48. The formula then provides that this subtotal of \$67,518.48 is to be subtracted by the original contract price, \$58,275.00, which the Claimant originally expected to pay had the Contractor completed the job in a workmanlike manner. If, as in this case, the claimant has not paid the original contractor the full amount of the contract price, then the claimant's actual loss will be reduced by the amount of money left unpaid on the contract. Therefore, the ALJ correctly followed the formula in this case and reached the compensable actual loss of \$9,243.48.

The ALJ used the appropriate regulatory formula for this case and properly calculated the actual loss. The ALJ's decision is thorough, supported by the evidence in the record and correct as a matter of law. The Panel does not find that the ALJ erred in his decision and will not overturn it on exceptions.

Having considered the parties' arguments, the documentary evidence contained in the record, and the ALJ's Recommended Decision, it is this 17th day of April 2018 **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**; AND
- C. That the Recommended Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

**Andrew Snyder**  
**Chairperson –Panel**  
**Maryland Home Improvement**  
**Commission**

IN THE MATTER OF THE CLAIM  
OF FIVE OCEANS, INC.,  
CLAIMANT,  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF MICHAEL BAKER,  
T/A BAKER'S HOME  
IMPROVEMENTS,  
RESPONDENT

\* BEFORE DOUGLAS E. KOTEEN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No. DLR-HIC-02-16-37551  
\* MHIC No. 15 (05) 949  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On February 26, 2016, Five Oceans, Inc. (Claimant)<sup>1</sup> filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$112,680.50<sup>2</sup> in alleged actual losses suffered as a result of a home improvement contract with Michael Baker, trading as Baker's Home Improvements (Respondent).

<sup>1</sup> In the Hearing Order, dated November 23, 2016, the MHIC identified the Claimant as Katherine Celona. (GF Ex. 3). At the hearing, the parties established that the Claimant is properly identified as Five Oceans, Inc., a Maryland corporation. (GF Ex. 7).

<sup>2</sup> This amount was set forth on the Claim form. (GF Ex. 7). At the hearing, counsel for the Claimant clarified that the Claimant is seeking the statutory maximum award of \$20,000.00.

I held a hearing on May 17, 2017 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant was represented by Brandy A. Peeples, Esquire. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent was not present at the hearing. After waiting approximately fifteen minutes, during which time neither the Respondent nor anyone authorized to represent him appeared, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.<sup>3</sup>

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 09.01.03; COMAR 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, what is the amount of that loss?

**SUMMARY OF THE EVIDENCE**

**Exhibits**

I admitted the following exhibits on behalf of the Claimant (CL Ex.):

- CL Ex. 1. Letter from Brandy A. Peeples, Esquire, counsel for Claimant, to MHIC, dated April 21, 2015;
- CL Ex. 2. Project Contract, dated August 28, 2014;

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<sup>3</sup> Notice of the May 17, 2017 hearing was mailed to the Respondent at his address of record with the MHIC in Brunswick, Maryland by certified mail and regular U.S. mail on March 2, 2017. Both notices were returned with the notation "forward time expired" and with reference to an alternative South Carolina address. (GF Ex. 1); COMAR 09.08.03.03A(2). A notice of hearing was subsequently mailed to the Respondent's forwarding address in Daniel Island, South Carolina by certified mail on March 10, 2017. A signed Green Card (Domestic Return Receipt) was received at the OAH from the South Carolina address on March 20, 2017. (GF Ex. 2). I conclude that the Respondent was afforded proper notice of the hearing and failed to attend. Therefore, I proceeded to conduct the hearing in the Respondent's absence.

- CL Ex. 3. Contractor Agreement, dated August 28, 2014;
- CL Ex. 4. Check No. 1037, dated August 28, 2014; No. 1044, dated September 19, 2014; and No. 1049, dated October 23, 2014;
- CL Ex. 5. Email from John H. Lentz II, to K.A. Celona, dated November 17, 2014;
- CL Ex. 6. Mountaintop Electric Company Invoice, dated December 1, 2014; with attached Check No. 1053, dated December 1, 2014; and Check No. 1067, dated March 5, 2015;
- CL Ex. 7. Letter from John H. Lentz, III, Mountaintop Electric Company, to Claimant, dated March 15, 2015;
- CL Ex. 8. City of Frederick Building Department Electrical Permit, dated November 6, 2014;
- CL Ex. 9. Eric S. Smith Plumbing Invoice, dated February 10, 2015;
- CL Ex. 10. Efficient Heating & Air Conditioning, Inc. Proposal, dated September 2, 2014;
- CL Ex. 11. Letter from David Shifflett, Efficient Heating & Air Conditioning, Inc., to DLLR, dated January 26, 2014;<sup>4</sup>
- CL Ex. 12. Design Flooring, Inc., Contract, dated November 28, 2014; with attached Check No. 1056, dated December 23, 2014; Check No. 1059, dated January 15, 2015; and Check No. 1058, dated January 15, 2015;
- CL Ex. 13. Check No. 1057, dated December 30, 2014;
- CL Ex. 14. Amazon Invoice (\$355.41), dated December 30, 2014;
- CL Ex. 15. Amazon Invoice (\$103.62), dated December 30, 2014;
- CL Ex. 16. Amazon Invoice, (\$150.10), dated December 30, 2014;
- CL Ex. 17. Pyramid Granite, LLC, Invoice, dated January 30, 2015;
- CL Ex. 18. Five Oceans – Home Depot Receipts, 18 receipts, dated November 29, 2014 through January 21, 2015;
- CL Ex. 19. Five Oceans Hard Damages chart, undated;
- CL Ex. 20. Email chain from K.A. Celona to Respondent, dated November 24, 2014 through December 2, 2014;
- CL Ex. 21. Email chain from K.A. Celona to Respondent, dated November 10-11, 2014; and
- CL Ex. 22. Email from K.A. Celona to Respondent, dated December 5, 2014.

I admitted the following exhibits on behalf of the Fund (GF Ex.):

- GF Ex. 1. Memoranda from OAH re: Undeliverable Mail, dated March 10, 2017, with attached Notices of Hearing, dated March 2, 2017; MHIC Hearing Orders, dated November 23, 2016; and U.S. mail and certified mail envelopes, marked Forwarding Time Expired, Return to Sender, received at OAH on March 8, 2017;
- GF Ex. 2. Notice of Hearing, dated March 10, 2017, with attached Certified Mail Receipt for May 17, 2017 hearing and signed Green Card (Domestic Return Receipt), received at OAH on March 20, 2017;
- GF Ex. 3. MHIC Hearing Order, dated November 23, 2017;
- GF Ex. 4. MHIC ID Registration and Professional License History for Respondent, dated May 16, 2017;
- GF Ex. 5. Real Property Data Search for respondent, dated May 16, 2017;

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<sup>4</sup> Based on when the home improvement work was performed, it appears this letter was dated incorrectly and should have been dated January 26, 2015.



- GF Ex. 6. Affidavit of Charles Corbin, dated May 16, 2017;
- GF Ex. 7. Home Improvement Claim Form from Claimant, filed February 26, 2016;
- GF Ex. 8. Letter from Joseph Tunney, Chairman, MHIC to Respondent, dated March 2, 2016; and
- GF Ex. 9. MHIC Complaint Form from Claimant, filed March 16, 2015.

**Testimony**

The Claimant presented testimony from Barbara Donlon, the Claimant's president, and Katherine Celona, the Claimant's vice-president.

The Respondent did not appear at the hearing and the Fund did not present any testimony.

**FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. The Respondent was a licensed home improvement contractor and salesman under MHIC Registration No. 106640 for the period from August 29, 2013 through August 29, 2015. (GF Ex. 4).
2. The Claimant is a Maryland corporation that owned two residential properties at the time it contracted with the Respondent to perform home improvement work at the Claimant's residential property at issue.
3. On August 28, 2014, the Claimant contracted with the Respondent to perform home improvement work at the Claimant's residential property on North Market Street in Frederick, Maryland. The contract called for the Respondent to perform renovations to the kitchen; repair windows; renovate two bathrooms; perform electrical work, including installation of a new furnace, air handlers, and recessed lighting; convert a third floor attic into a master suite and master bathroom; install a concrete basement floor; perform HVAC work, including installation of central air; refinish and stain hardwood flooring; perform interior and exterior painting; install new shingles on the garage roof; install a new entry door; and perform plumbing work. The contract also called for the Respondent to demolish and reconstruct a balcony; remove a back

porch and construct a deck; install gutters; perform landscaping work; and replace fencing. (CL Exs. 2, 3).

4. The contract called for the Respondent to supply all materials. The parties signed two separate contracts covering the home improvement work, both dated August 28, 2014. (CL Ex. 2, 3).

5. The total cost of the contract<sup>5</sup> was \$58,275.00. The contract called for the work to begin as soon as possible and be completed by October 20, 2014. The contract also provided for the Claimant to make three equal payments of \$19,425.00, with the first payment on August 28, 2014, the second payment on September 10, 2014, and third payment upon completion. (CL Exs. 2, 3).

6. The Claimant made the following payments to the Respondent by check:

August 28, 2014	Check No. 1037	\$19,425.00
September 19, 2014	Check No. 1044	\$19,425.00
October 23, 2014	Check No. 1049	\$ 5,000.00.

(CL Ex. 4).

7. The Claimant made the third payment of \$5,000.00 before completion of the project because the Respondent requested an advance. The Claimant made total payments of \$43,850.00 and did not pay the full contract price because the Respondent did not complete the work.

8. The Respondent failed to complete the work under the contract and performed some work in an unworkmanlike manner. The Respondent's employees failed to properly install the electrical wiring, failed to properly identify the electrical wires that were worked on, failed to upgrade the electrical panel, and failed to properly install the lighting fixtures. (CL Ex. 5).

9. The Respondent did not perform the work in a timely manner, and failed to complete all work called for in the contract. The Respondent performed no work at the property after November 18, 2014.

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<sup>5</sup> For simplicity in this Decision, I have referred to the two contracts as "the contract," unless otherwise specified.

10. The Respondent failed to perform any work on the third floor master suite and third floor master bathroom. He did not perform any work on the garage, which included roofing work, painting, and installation of a new door. He also failed to complete work on the porch, a new deck, or the bulkheads. Additionally, he failed to complete the kitchen remodeling and bathroom renovation work, and also failed to complete hardwood flooring, painting, plumbing, electrical, furnace, and HVAC work.

11. The Respondent performed some work under the contract, including removal of a first floor wall, removal of old kitchen cabinets and gutting the kitchen, purchasing new cabinets, purchasing drywall, repairing several windows, and gutting several bathrooms. He also installed a concrete floor in the basement, performed some drywall work on the bulkheads, did some painting, removed an awning, removed some carpeting, and performed some electrical work. Despite this work, the Respondent left a substantial amount of work incomplete and performed some work in an unworkmanlike or inadequate manner.

12. The Respondent attempted to modify the draw schedule contrary to the terms of the contract by requesting expedited payments. (CL Ex. 20). The Claimant provided the Respondent with one advance payment of \$5,000.00 on October 23, 2014, but made no further expedited payments under the contract because the Respondent did not complete the work. (CL Ex. 4).

13. The Respondent attempted to charge the Claimant additional amounts for dumpster and cleanup fees, but the Claimant did not agree. The Respondent failed to clean up debris and placed some debris in the garage. (GF Ex. 9).

14. Katherine Celona (Celona), the Claimant's vice-president, told the Respondent that time was of the essence for the project and the contract called for completion of the work by October 20, 2014. (CL Ex. 3). Celona was on site most days that the work was performed. The

Respondent did not work quickly and efficiently on the project as promised. The Respondent used fewer employees than promised and failed to perform work on a regular and consistent basis.

15. Celona made repeated requests for the Respondent to complete the work and do so timely. The Respondent told Celona that he would not complete the work until he received additional payments, but such payments were not required by the contract. Celona requested that the Respondent furnish documents to demonstrate which materials had been purchased and which expenses had been paid to support his request for expedited payments. The Respondent did not provide Celona with the requested documents and failed to complete the work. (CL Exs. 4, 20-22). The Respondent was ill for an unspecified period of time. (CL Ex. 20).

16. Barbara Donlon, the Claimant's president, requested that the Respondent refund some of the monies the Claimant paid because the work was incomplete. The Respondent refused to refund any money.

17. The Respondent failed to make timely and/or complete payments to the electrical, plumbing, and HVAC subcontractors that performed work on the project. This led the subcontractors to refuse to perform further work, or to delay their work, until they received payment. Celona discussed these payment problems with the Respondent regarding the subcontractors. (CL Ex. 22).

18. The Respondent was delayed in performing work, failed to complete the work, failed to purchase all required materials, failed to provide requested documents to support his request for expedited payments, requested additional funds outside the contract terms, failed to pay subcontractors, and failed to respond to Celona's requests to complete the work. As a result, Celona notified the Respondent by email on December 5, 2014 that he was in breach of the contract. Celona also advised the Respondent that she had changed the locks and the Respondent was no longer permitted to enter the property. She also instructed the Respondent to promptly

pay the electrical and plumbing subcontractors for their work. (CL Ex. 22). Additionally, she advised the Respondent she would arrange for him to pick up his tools and equipment and return his keys to the property. (CL Ex. 20).

19. The Respondent initially subcontracted with Mountaintop Electrical Company (MEC) to perform some electrical work at the Claimant's property. MEC performed some work in a proper manner, but the Respondent failed to pay MEC for the work performed. (CL Ex. 7).

20. The Respondent failed to complete the electrical work in a timely manner, his own employees performed some electrical work in an unworkmanlike manner, and the Respondent failed to pay MEC for electrical work it performed. As a result, Celona contracted with MEC on December 1, 2014 to repair and complete the electrical work at a cost of \$7,000.00. (CL Exs. 6, 7).

21. MEC obtained an electrical permit from the City of Frederick Building Department on November 6, 2014, performed electrical repairs, and completed the electrical work. The electrical work passed inspection on or about January 26, 2015. MEC is licensed by the State of Maryland as an electrician. (CL Exs. 6-8).

22. The Claimant paid MEC \$7,000.00 by check for the electrical work, as follows:

December 1, 2014	Check No. 1053	\$2000.00
March 5, 2015	Check No. 1067	\$5,000.00.

(CL Ex. 6).

23. Eric S. Smith Plumbing (Smith) originally subcontracted with the Respondent to perform plumbing work at the property. The cost for plumbing installation work, PVC pipes, and copper water piping was \$4,850.00. Smith performed this plumbing work and billed the Respondent on February 10, 2015 for the work, but was never paid by the Respondent. As Smith completed the plumbing work at the Claimant's property and was not paid, Celona promised to pay Smith \$4,850.00 for the plumbing work. Smith is licensed by the State of Maryland. (CL Ex. 9).

24. The Respondent originally subcontracted with Efficient Heating and Air Conditioning, Inc. (Efficient) on September 2, 2014 to install dual zone heating and air conditioning systems on the first and second floors of the property. The cost for this work was \$15,000.00. (CL Ex. 10).

25. Efficient completed the work, but the Respondent paid Efficient only \$10,000.00 for the work performed. As Efficient completed the HVAC work at the Claimant's property, Celona intends to pay Efficient the remaining \$5,000.00 for the HVAC work it performed. Efficient is licensed in Maryland to perform this work. (CL Exs. 10, 11).

26. The Claimant contracted with Design Flooring, Inc. (DFI) of Centreville, Virginia on November 28, 2014 to repair and complete painting and other renovation work in the kitchen and bathrooms that the Respondent failed to perform. The cost of this contract was \$10,000.00, plus materials. (CL Ex. 12). DFI is not licensed by the MHIC to perform home improvement work in Maryland.

27. The Claimant paid DFI \$10,212.89 by check for this work, including the cost of materials, as follows:

December 23, 2014	Check No. 1056	\$5,000.00
January 15, 2015	Check No. 1058	\$5,000.00
January 15, 2015	Check No. 1059	\$ 212.89.

(CL Ex. 12).

28. The Claimant paid \$500.00 to Amazing Glaze on December 30, 2014 to complete work on a bathtub. (CL Ex. 13). Amazing Glaze is licensed in Maryland to perform this work.

29. The Claimant purchased lighting and bathroom fixtures from Amazon.com on December 30, 2014 in the amount of \$609.13, for materials to complete bathroom renovation work. (CL Exs. 14-16).

30. The Claimant purchased granite and kitchen sink materials from Pyramid Granite, LLC (Pyramid), on January 30, 2015 in the amount of \$1,645.00 for use in completing kitchen renovation work. (CL Ex. 17).

31. The Claimant purchased materials from Home Depot in the amount of \$4,064.35 during the period from November 29, 2014 through January 21, 2015 for bathroom fixtures and other materials needed to complete work under the contract. (CL Ex. 18).

32. The Claimant paid a total of \$7,500.00 to licensed contractors to repair and complete work under the contract. The Claimant purchased materials in the amount of \$6,318.48 for use in the repair and completion of work under the contract. Celona intends to make additional payments on behalf of the Claimant of \$4,850.00 to the plumbing contractor and \$5,000.00 to the HVAC contractor who completed the work, but were not paid by the Respondent.

33. The Claimant's cost to repair and complete the work under the contract that is compensable by the MHIC is \$23,668.48.

34. The Claimant's actual loss is \$9,243.48.

35. The Claimant obtained a default judgment against the Respondent in district court. The Respondent has not made any payments to the Claimant pursuant to the default judgment.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of its claim by a preponderance of the evidence. Md. Code Ann., State Gov't. §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions 1:7* (3d ed. 2000)).

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);<sup>6</sup> *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.” Md. Code Ann., Bus. Reg. § 8-401.

An owner is defined in section 8-101(k) of the Business Regulation Article as “a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement.” Md. Code Ann., Bus. Reg. § 8-101(k) (Supp. 2016). A person is defined in section 1-101(g) of the Business Regulation Article to include a corporation. Md. Code Ann., Bus. Reg. § 1-101(g). An owner may make a claim against the Fund if the owner resides in the home or does not own more than three residences. Md. Code Ann., Bus. Reg. § 8-405(f)(2). Therefore, a corporation may file a claim with the Fund and may recover an award if it establishes that it suffered an actual loss as defined in the statute. Counsel for the Fund acknowledged that the corporate Claimant could recover an award from the Fund if it satisfied the other statutory requirements. As addressed below, the Claimant has met the statutory requirements, including that it owned two residential properties at the time it contracted with the Respondent to perform the home improvement. For the following reasons, I find the Claimant has proven eligibility for compensation from the Fund.

The evidence established that the Claimant and the Respondent executed two contracts on August 28, 2014 for the Respondent to perform substantial renovations at the Claimant’s residential property in Frederick, Maryland. The Claimant’s witnesses, Barbara Donlon, the

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<sup>6</sup> Unless otherwise noted, all references to the Business Regulation Article (Bus. Reg.) are to the 2015 Replacement Volume.



Claimant's president, and Katherine Celona, the Claimant's vice-president, acknowledged that, although there were differences in language in the two contracts, the scope of work and the contract price were the same. The contract price was \$58,275.00 for the work described in the contract. (CL Exs. 2, 3). The Claim that the Claimant filed on February 26, 2016 states there were no changes to the original contract. (GF Ex. 7). The contract provides that any changes to the contract must be agreed to and executed in writing, and the witnesses confirmed this requirement. (CL Exs. 2, 3). The witnesses testified that the Respondent attempted to add additional charges to the contract, for items such as flooring and kitchen renovations, but that no such changes were agreed to in writing. The Claimant argued that the scope of the contract was narrowed, and the contract price reduced, when it became apparent that the Respondent would be unable to complete work on the third floor master suite, third floor master bath, and the garage. Celona testified that this would have reduced the contract price by \$12,658.00. (CL Ex. 20). However, the Claimant did not establish that the parties agreed to and executed in writing any changes to the contract. Therefore, I conclude that the original contract price of \$58,275.00 was never modified.

The evidence establishes that the Respondent failed to complete substantial portions of work under the contract, and performed some work in an unworkmanlike manner. The Respondent initially had an employee perform some electrical work. After a licensed electrician with MEC reviewed this work, it was apparent that the electrical work was performed poorly. The electrical wiring and electric switches were not installed correctly, the electrical wiring and changes were not properly labeled, the electric panel was not upgraded, and some lighting was not installed and wired correctly.

The Respondent failed to perform any work on the third floor master suite and the third floor master bath. He also failed to perform any work on the garage, including roofing, painting,

and installation of a new door. He also did not complete work on the porch, deck, and bulkheads. In addition, the Respondent failed to complete the kitchen remodeling, bathroom renovations, hardwood flooring, painting, plumbing, electrical, furnace, and HVAC work.

The Claimant made two payments of \$19,425.00 on August 28, 2014 and September 19, 2014, respectively, in accordance with the draw schedule in the contract. The Respondent sought additional funds from the Claimant outside the draw schedule. While the Claimant agreed to pay the Respondent a \$5,000.00 advance on October 23, 2014 that was not contemplated by the contract, the Claimant did not agree to any other requests by the Respondent for expedited payments, which were not due until after the work was completed. (CL Exs. 2-4).

The Respondent was obligated to pay the subcontractors for the work they performed and not subject the Claimant to problems arising from nonpayment. COMAR 09.08.01.12. However, the Respondent failed to make timely payments to electrical, plumbing, and HVAC subcontractors. This created difficulty and confusion for the Claimant because some of the subcontractors reported to Celona that the Respondent had told them he was unable to pay the subcontractors because the Claimant had failed to pay him. The Respondent's claim was untrue because the Claimant made timely payments to the Respondent under the terms of the contract and also provided the Respondent with the advance that was not required by the contract.

The Respondent failed to complete the work by October 20, 2014 as the contract required, failed to use a sufficient number of employees as promised, failed to work on the project on a regular and consistent basis, and failed to furnish receipts and other documents to support his request for expedited payments. In addition, the Respondent was not responsive to Celona's repeated requests that he promptly complete the work. On or about December 5, 2014, Celona decided she no longer wanted the Respondent to perform additional work under the contract because of his delays in performing the work and responding to Celona's inquiries, and

due to his failure to pay the subcontractors. I conclude that Celona acted reasonably under these circumstances in deciding she no longer wanted the Respondent to work on the project. Md. Code Ann., Bus. Reg. § 8-405(d).

For the foregoing reasons, I conclude that the Respondent performed home improvement work under the contract in an unworkmanlike, inadequate, and incomplete manner. Md. Code Ann., Bus. Reg. § 8-401.

In response to the Respondent's unworkmanlike and incomplete work, the Claimant contracted with other licensed contractors to complete the work. The Claimant contracted with MEC, an electrical company originally hired as a subcontractor by the Respondent to perform electrical work. Pursuant to a December 1, 2014 contract between MEC and the Claimant, MEC repaired and completed the electrical work and the Claimant paid MEC \$7,000.00 for this work. (CL Exs. 6-8). I conclude that the Claimant is entitled to compensation for work performed by MEC to repair and complete work under the contract.

Counsel for the Fund argued that the Claimant is also entitled to compensation from the Fund for work performed by Smith and Efficient to complete work under the contract based on the Claimant's stated intent to pay these subcontractors for the work they performed.

The Claimant worked with Smith, a licensed plumber, and Efficient, a licensed HVAC company, to have them complete the plumbing and HVAC work that the Respondent failed to perform under the contract. The Claimant's relationship with Smith and Efficient was more... complicated because the Respondent initially contracted with these entities as subcontractors to perform work under the contract. When the Respondent failed to pay these subcontractors the monies that were due, they initially refused to perform any further work.

Although Smith never had a written contract with the Claimant, after speaking with Celona, Smith agreed to complete the plumbing work in accordance with the invoice he gave the

Respondent. Smith performed plumbing work in the kitchen and bathrooms to complete work that the Respondent failed to perform. The cost of this work was \$4,850.00 pursuant to a February 10, 2015 contract between Smith and the Respondent. (CL Ex. 9). Celona promised to pay Smith for the plumbing work performed to complete the contract because the Respondent had failed to pay Smith for this work. Although the Claimant did not contract in writing directly with Smith, I find that Smith performed plumbing work on behalf of the Claimant to complete work under the original contract. Therefore, because Celona testified credibly that the Claimant intends to pay Smith for this work, the Claimant is entitled to compensation for the work performed by Smith to complete the plumbing work.

The Claimant established a similar relationship with Efficient, an HVAC subcontractor. Although the Claimant did not contract directly with Efficient, Efficient performed work on behalf of the Claimant to complete work under the original contract. (CL Exs. 10-11). Efficient contracted with the Respondent on September 2, 2014 as an HVAC subcontractor to install dual zone heating and air conditioning systems on the first and second floors of the Claimant's property under the scope of the original contract at a cost of \$15,000.00. The Respondent paid Efficient \$10,000.00 for this work, but failed to pay Efficient the remaining \$5,000.00 that was owed. Celona explained convincingly that the Claimant intends to pay Efficient the outstanding balance for the work it performed to complete the HVAC work under the contract because it is the right thing to do. Although the Claimant did not contract directly with Efficient in writing, I find that Efficient performed work on behalf of the Claimant to complete HVAC work under the original contract. Therefore, the Claimant is also entitled to compensation for work performed by Efficient so it can pay Efficient the outstanding balance for this work.

The Claimant is also entitled to compensation in the amount of \$500.00 for bathtub work performed by Amazing Glaze, a licensed contractor, to complete bathroom renovation work under the scope of the original contract. (CL Ex. 13).

The Claimant is also entitled to compensation for the materials it purchased to complete work under the contract. The contract provides that the Respondent was required to supply all materials for the project. (CL Exs. 2, 3). Therefore, the Claimant is entitled to compensation for the materials it purchased that fall within the scope of the contract. This includes \$609.13 that Barbara Donlon purchased from Amazon.com on behalf of the Claimant for bathroom fixtures (CL Exs. 14-16), \$1,645.00 for purchases from Pyramid for granite countertops and sink materials for the kitchen renovation (CL Ex. 17), and \$4,064.35 for bathroom and kitchen fixtures that the Claimant purchased from Home Depot. (CL Ex. 18). The Claimant submitted receipts for the purchase of these materials and established that they fell within the scope of the contract. (CL Exs. 14-18).

The Claimant also contracted with DFI to perform painting, kitchen, and bathroom renovation work. The evidence establishes that DFI is not licensed in Maryland as a home improvement contractor. Although the statute and regulations do not expressly exclude compensation for an unlicensed contractor that performs home improvement work to repair or complete a contract, the overall MHIC statutory scheme requires that work be performed by licensed contractors and is designed to regulate home improvement work performed in Maryland. An owner may recover compensation from the Fund only for an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). It follows that if work is performed by a contractor not licensed in Maryland to repair or complete work under a home improvement contract, this work is also ineligible for compensation from the Fund. As argued by counsel for the Fund, this is consistent with the public policy of the MHIC and Fund. Moreover,

the MHIC website states expressly that “[t]he Fund also will not reimburse a claimant for money paid to an unlicensed home improvement contractor to correct or complete work performed that is the subject of the claim.” [www.dllr.state.md.us/license/mhic/mhicfaqgf.shtml](http://www.dllr.state.md.us/license/mhic/mhicfaqgf.shtml). (last referenced July 28, 2017). While unfortunate, the Claimant is not entitled to reimbursement for the work performed by DFI because it was not licensed in Maryland as a home improvement contractor.

#### Calculation of Actual Loss

Having found eligibility for compensation, I now turn to the amount of the award to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e); COMAR 09.08.03.03B(1). The MHIC regulations offer three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). The following formula offers the most appropriate measurement to determine the amount of the 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).

The Respondent performed work under the contract with the Claimant. As explained above, the contract price was \$58,275.00 and that price was not modified by agreement of the parties. The Claimant paid the Respondent a total of \$43,850.00. As addressed above, the Claimant contracted with MEC and Amazing Glaze, licensed contractors, to repair and complete work under the contract, and paid those contractors \$7,500.00 for this work. The Claimant also intends to pay Smith and Efficient, licensed contractors, a total of \$9,850.00 for the work they

performed to complete the contract. In addition, the Claimant paid a total of \$6,318.48 to Amazon.com, Pyramid, and Home Depot for materials needed to complete the work, which materials should have been supplied by the Respondent under the terms of the contract. As explained above, the Claimant is not entitled to compensation for work performed by DFI, a contractor not licensed in Maryland.

Therefore, the Claimant's actual loss is calculated as follows under the appropriate formula:

Amount paid to the Respondent:	\$43,850.00
Amount paid to contractors:	\$ 7,500.00
Amount to be paid to contractors:	\$ 9,850.00
Amount paid for materials:	+ \$ 6,318.48
Total:	\$ 23,668.48
Reasonable cost to repair and complete:	+ \$23,668.48
Subtotal	\$67,518.48
Contract price	- \$58,275.00
Actual Loss	\$ 9,243.48.

In accordance with the formula set forth above, I conclude that the Claimant's actual loss is \$9,243.48 as a result of the acts or omissions of the Respondent in performing home improvement work under the contract in an unworkmanlike, inadequate, and incomplete manner. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c). Therefore, the Claimant is entitled to reimbursement from the Fund in this amount.

**PROPOSED CONCLUSION OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual compensable loss of \$9,243.48 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$9,243.48 to compensate it for its actual loss; 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 ten percent (10%), pursuant to section 8-410 of the Business Regulation Article of the Annotated Code of Maryland as set by the Maryland Home Improvement Commission; and

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

**Signature on File**

August 2, 2017  
Date Decision Issued

\_\_\_\_\_  
Douglas E. Koteen  
Administrative Law Judge

DEK/da  
# 169095



**PROPOSED ORDER**

***WHEREFORE, this 12<sup>th</sup> day of September, 2017, 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.***

***Sachchida Gupta***

***Sachchida Gupta  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**