

IN THE MATTER OF THE CLAIM
 OF MARTIN BARRETT,
 CLAIMANT
 AGAINST THE MARYLAND HOME
 IMPROVEMENT GUARANTY FUND
 FOR THE ALLEGED ACTS OR
 OMISSIONS OF RICHARD
 GARHART,
 T/A R.M. GARHART & SONS,
 RESPONDENT

* BEFORE MICHAEL R. OSBORN,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH No.: DLR-HIC-02-18-03751
 * MHIC No.: 17 (05) 698
 *
 *
 *
 *

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On September 6, 2017, Martin Barrett (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Richard Garhart, t/a R. M. Garhart & Sons (Respondent).

I held a hearing on May 2, 2018, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented

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

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); Code of Maryland Regulations (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

The Claimant offered the following exhibits, which were admitted as evidence:

- Cl. #1 - Contract, June 12, 2015
- Cl. #2 - Spreadsheet with copies of five checks to the Respondent
- Cl. #3 - Photograph (Electrical Panel)
- Cl. #4 - GeoDeck's Decking Installation Instructions
- Cl. #5 - Photograph (Workmanships Issues)
- Cl. #6 - Five invoices from Jerry Smith Contracting
- Cl. #7 - Copies of four checks to Jerry Smith
- Cl. #8 - Spreadsheet with totals from stores and copies of various receipts, February 24, 2016 to September 14, 2016

The Respondent offered the following exhibits, which were admitted as evidence:

- Resp. #1 - Transcript of District Court for Howard County, Case No. 772-16
- Resp. #2 - License information for Jerry Smith

The Fund offered the following exhibits, which were admitted as evidence:

- Fund #1 - Letter to Michael Bramnick, Esq., from the Office of the Attorney General, December 21, 2017
- Fund #2 - Returned Mail: Notice of Hearing marked as unclaimed

Fund #3 - Respondent's licensing history with the HIC
Fund #4 - Letter to the Respondent from the DLLR, September 6, 2017

Testimony

The Claimant testified on his own behalf.

The Respondent testified on his own behalf and presented the testimony of Thomas Frey, Howard County Building Inspector.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-40188.

2. On June 12, 2015, the Claimant and the Respondent entered into a contract for the Respondent to build a covered deck on more than one side of the Claimant's home, a "wrap-around" deck, which was to be tied into the home's existing porch (contract). The new deck, when finished, would be approximately fifty-seven feet long across the back of the house, turn at the rear left corner of the house, and tie into the porch at the front of the house. The contract also included installation of two sets of steps. The contract stated that work would begin on July 1, 2015 and would be completed by approximately September 1, 2015.

3. The original agreed-upon contract price was \$55,000.00. Under the contract payments were due as follows:

- \$18,333.00 – deposit
- \$18,333.00 – ground work complete
- \$ 9,166.00 – deck is up and decked in
- \$ 9,168.00 – completion of all work

4. The contract included a boilerplate “General Terms and Conditions of Agreement” that laid out various understandings of the parties. The boilerplate was followed by a handwritten description of the scope of the work to be performed and the material to be used. The materials to be used included generic materials such as “6 x 6 posts,” “2 x 8 x 16 joists,” and “2 x 12 rafters, wrapped in PVC.” The contract also called for installation of a new second-floor window to accommodate the new porch roof. One item was specific; the deck boards were to be “T&G¹ Trex (gray).”

5. An electrical box was originally mounted on the back of the Claimant’s home. Due to the addition of the deck, to comply with the Howard County construction code, the electrical box had to be removed from its original mounting location and relocated away from the house, just beyond the new deck.

6. Under the contract the Respondent was not responsible for any electrical work.

7. In July 2015, the Respondent began work under the contract. As work began, the electrical box was in its original location. Prior to any work being done, the Claimant contacted BGE to discuss requirements for moving the electrical box.

8. In July and August 2015, the Respondent performed all the work necessary to support the new deck, such as installation of concrete footers, installation of deck support posts, deck framing, deck joists, and installed some of the vertical roof support posts.

9. The Respondent also installed some deck boards that were GeoDeck brand, not the Trex brand specified in the contract. The GeoDeck brand material was a hollow-core construction deck board that, per manufacturer’s instructions, required end caps be installed at

¹ Tongue and groove.

both ends to prevent water intrusion. The Respondent laid GeoDeck brand deck boards without end caps on the Claimant's deck.

10. The Claimant paid the Respondent the following:

a.	June 8, 2015	\$10,000.00
b.	June 12, 2015	\$10,000.00
c.	June 12, 2015	\$ 8,333.00
d.	July 1, 2015	\$ 8,333.00 ²
e.	July 31, 2015	<u>\$ 9,166.00</u>
		\$45,832.00

11. The Respondent continued to build the deck frame and deck joists until the new deck structure was between six and ten feet of the location of the electrical box, which was still in its original location. The Respondent arrived at this point in deck construction approximately the first week of September 2015.

12. By the middle of August 2015, the Claimant noticed that the deck board used by the Respondent was not the Trex brand specified in the contract, and told the Respondent the deck board being used was unacceptable. The Claimant also told the Respondent that the GeoDeck product was improperly installed, end to end, without end caps. The Respondent blamed the supplier for not telling the Respondent about the need for end caps, but did not offer to correct the problem.

13. In various discussions with the Respondent, the Claimant pointed out deficiencies in the Respondent's work. Among them the Claimant pointed out that deck roof rafters were only nailed into the roof support beam and that there were no metal rafter ties. The Claimant also pointed out that roof deck support posts were only toe-nailed to the deck and that there were

² Claimant's Exhibit #2 includes copies of checks written by the Claimant to the Respondent. Check number 1440 is in the amount of \$8,333.00, but the date of issue is illegible. This check was presented for payment and cleared on July 15, 2015.

no metal post ties. In response to these sorts of comments by the Claimant the Respondent typically replied that he was not done yet.

14. On or about early September 2015, the Respondent told the Claimant that he was not willing to perform any further work under the contract until the electrical box was relocated.

15. The Claimant told the Respondent that he was working with BGE and with an electrical contractor to move the electrical box. The Claimant requested the Respondent continue to work, and to install posts, roof rafters, roof sheathing and shingles, and to make progress under the contract, generally, in areas unrelated to the electrical box move. The Respondent refused.

16. In a series of emails and text messages over the next several weeks the Claimant urged the Respondent to return to work. The Respondent refused.

17. On October 31, 2015, the Claimant sent a text message to the Respondent informing him that the electrical box relocation work would be complete on November 5, 2015, and that the Respondent could return to work without further delay.

18. On October 31, 2015, the Claimant had a face-to-face meeting with the Respondent, and informed the Respondent that the electrical work would be done and the Respondent could return to work on November 5, 2015. In response, the Respondent sought from the Claimant a written agreement that the Respondent would not be responsible for any delays under the contract. The Respondent also sought additional money from the Claimant to purchase materials to resume work. The Respondent would not commit to returning to work on the contract at any date on or near November 5, 2015.

19. The Claimant refused to sign any waiver of responsibility for contract delays, and refused to pay to the Respondent any more money until work under the contract was complete.

20. From October 31, 2015 through November 15, 2015, the Claimant sent several text messages to the Respondent, made several phone calls to the Respondent, and met with the Respondent at least once in an effort to get the Respondent to resume work. The Claimant called and spoke to the Respondent on December 7, 2015, left the Respondent a voicemail message on December 17, 2015, and met with him face-to-face on January 12, 2016, in an effort to convince the Respondent to return to work.

21. On January 12, 2016, the Respondent offered to return \$8,000.00 in return for a mutual agreement to terminate the contact at that point. The Claimant refused.

22. The Respondent never returned to the Claimant's home to perform any more work under the contract.

23. After the Respondent's departure, the Claimant performed much of the remaining work on the project himself, including removing the GeoDeck brand deck boards and inserting the missing end caps and reinstalling the GeoDeck product.³

24. From February 24, 2016 through September 14, 2016, the Claimant purchased materials to complete the deck, hand rails, and the deck roof in the amount of \$12,813.73.⁴

25. The Claimant hired Jerry Smith Contracting to complete work on the contract with the Respondent. Jerry Smith Contracting purchased materials necessary to complete the contract, and charged the Claimant for labor.

³ The Claimant testified that he chose to use the GeoDeck brand boards because it was simply too costly to tear out the GeoDeck product and start over with all new Trex brand materials.

⁴ Claimant's Exhibit #8 is a ledger reflecting the date, location and amount of each purchase, with accompanying receipts attached. Between February 2015 and September 2015, the Claimant made stops for supplies on forty-five occasions, making purchases as much as \$5,920.14 and as little as \$10.58.

26. From March 2016 through September 2016, the Claimant paid Jerry Smith

Contracting as follows:

March 31, 2016	\$16,961.86	(\$4,191.86 materials, \$12,770.00 labor)
April 3, 2016	\$ 9,596.43	(\$2,009.43 materials, \$7,587.00 labor)
May 4, 2016	\$ 3,728.49	(\$638.49 materials, \$800.00 labor, \$2,290.00 materials and labor not separately described on the Jerry Smith Contracting invoice)
September 16, 2016	<u>\$ 3,300.00</u>	(all labor)
	\$33,586.78	(\$6,839.78 materials, \$24,457.00 labor, \$2,290.00 labor and materials)

27. The Claimant's actual financial loss is calculated as follows:

Amount paid to Respondent: \$45,832.00

Amount Claimant paid for supplies: \$12,813.73

Amount paid to Smith Contracting: \$33,586.78

Amount to complete contract: \$46,400.51

Amount paid to Respondent

plus amount to complete: \$92,232.51

Minus contract cost: \$55,000.00

Actual loss \$37,232.51

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁵ "[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)).

⁵ As noted above, "COMAR" refers to the Code of Maryland Regulations.

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);⁶ *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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Claimant’s case was straightforward. He hired the Respondent to construct a wrap-around deck and paid the Respondent \$45,832.00 to do so, and owed the Respondent \$9,166.00 when the contract was complete. He presented evidence that there was a lot of work the Respondent could have done even with the unanticipated delay in moving the electrical box, but the Respondent refused to do any more work. When the Claimant told the Respondent he was cleared to resume work on November 5, 2015, the Respondent refused and sought an agreement from the Claimant that he, the Respondent, would not be responsible for any delays in completion of the work. The Respondent also sought more money for supplies, which the Claimant refused. The Claimant testified that the Respondent never identified when he would return to work, or just what length of delay the Respondent was referring to. The Claimant testified that if the Respondent had provided a specific date on which the Respondent would return to work he would have considered it and, in all likelihood, would have approved

⁶ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

a reasonable delay. What the Respondent sought, however, was apparently an open-ended delay without any benchmark whatsoever as to when work would resume or be completed. This was unacceptable to the Claimant. The Claimant disclaimed that he ever agreed to installation of the GeoDeck brand deck board and that he had done his homework and wanted Trex brand only.

The Claimant testified that he did not consider whether Jerry Smith was a contractor licensed by the MHIC when he hired Jerry Smith Contracting to complete the contract after the Respondent refused to do any further work.

The Respondent testified that the Claimant approved the GeoDeck brand deck board because the color of Trex brand deck board the Claimant wanted was not available. He conceded that he installed the deck board improperly but was willing to remove the deck boards and install the end caps. The Respondent testified that he asked the Claimant for a three-an-a-half month delay in resuming work after the electrical box was moved, but the Claimant refused. The Respondent considered it impractical to do any more work on the contract such as installation of roof supports, roof rafters, roof sheathing or shingles or any finish work such as gutters or window installation until the deck was completed.

The Respondent testified that he tried to explain to the Claimant that it was not possible to return to the contract immediately after the electrical box was installed because he has a small company with crews engaged elsewhere, but the Claimant was unwilling to consider any further delay. At the hearing, he added that at the same time as the contract was being performed he faced a cancer scare and had to attend to his health. He also offered various reasons why returning to the Claimant's home was unacceptable, such as winter weather, possible mud, and the presence of dogs on the property.

The Respondent described the Claimant as relentless in his interference with performance of the contract, and that he resented the Claimant telling him how to do the work. He conceded that he did not give the Claimant any specific date when he would return to the contract or when it would be completed but sought, generally, a three-an-a-half month delay to return to work, when the weather would be better. For reasons he was unable to explain, the Respondent said he was leery about the Claimant making a final payment when the work was done; however, he agreed the Claimant made timely, even early, progress payments. He testified that he was willing to return to work on the contract but, in January 2016, he received a letter from the Claimant's attorney instructing him to do no further work.

The Respondent presented the testimony of Thomas Frey, Howard County Building Inspector. Mr. Frey testified that he was responsible for inspecting the deck framing, only. He was aware that the electrical box had to be moved but, nevertheless, approved the deck because it was done correctly to the point it stopped short of the electrical box and he was confident that the Respondent knew how to finish the deck framing without the need for him (Frey) to return for another inspection. He did not issue a "stop order" or any other instruction to stop all further work on the contract until the deck was completed. Mr. Frey testified that there was nothing that stopped the Respondent from performing work under the contract unrelated to moving the electrical box, such as posts, steps, roof rafters, roof construction and window installation. In response to the Respondent's questions whether it would be impossible to construct the roof when deck boards were not yet laid, Mr. Frey said a temporary floor of plywood or similar material could be put in place over existing deck joists so workers could use ladders to work on the roof structure, and that in his opinion the deck board could be laid at a later date, when the last small section of deck framing was completed.

The Respondent, in an effort to demonstrate the Jerry Smith Contracting costs should not be taken into consideration, presented evidence that Jerry Smith was a contractor licensed by the MHIC starting in 1983, that he was licensed continuously as a home improvement contractor through February 11, 2005, but that he was not licensed when he did work for the Claimant. The Fund asserted that, as a matter of policy, I should not use the cost of completion by a contractor not licensed by the MHIC at the time work was performed as a measure of damages. I discuss this argument below.

No evidence was presented relating to the value of the work performed by the Respondent by the time he refused to perform any further work, which was September 2015.

The Respondent performed incomplete home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. Under COMAR 09.08.03.03B(3), in the absence of the need for a unique measurement, recoveries against the Fund are calculated using one of three formulas. This regulation provides:

(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.

Under COMAR 09.08.03.03B(4), “[t]he Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed. In addition, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

“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.” COMAR 09.08.03.03B(3)(b). That measure is inapplicable here. If, as the Fund argues, I do not use the cost of completion by an unlicensed contractor as a measure of damages, this formula may apply – as if the Claimant never solicited another contractor.

However, I am unable to apply this formula as there was no evidence presented as to the value of the work already performed by the Respondent when he did not return to perform work under the contract.

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).

I applied this formula to calculate the Claimant's actual loss, and included in that calculation the cost of materials the Claimant purchased himself (\$12,813.73).

In addition to applying the formula under COMAR 09.08.03.03B(3)(c), I also took into a consideration that the MHIC may apply a unique measurement, which is warranted here.

The Claimant did not select Jerry Smith Contracting to complete the contract because Jerry Smith was, or was not, a licensed home improvement contractor. No one disagrees with the fact that Jerry Smith was not, at the time he completed the contract, licensed. However, Jerry Smith held a MHIC licensed for twenty-two years, from 1983 through 2005. I therefore find it reasonable to conclude that what Jerry Smith Contracting charged the Claimant to complete the contract is a reasonable measure of the Claimant's actual loss. This measure is, under MHIC practice, "unique."

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$37,252.31 exceeds \$20,000.00 and is less than the Claimant paid the Respondent. Therefore, the Claimant's recovery is limited to \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

I am mindful of the Fund's argument that I should not recommend an award from the Fund for completion work performed by an unlicensed contractor.⁷ Fund Exhibit #4 is the Claimant's "Home Improvement Claim Form" submitted by the Claimant to the MHIC on July 24, 2017.

⁷ Fund Exhibit #1 is a December 21, 2017 letter to the Claimant from John D. Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation, to Michael Bramnick, Esquire, acknowledging that the Department has received notice from the Claimant regarding a judgment in the amount of \$30,000.00 obtained by the Claimant against the Respondent in the District Court of Maryland for Howard County. In this letter Mr. Hart explains to Mr. Bramnick that the MHIC will not be ordering the Fund to pay the Claimant any money because, *inter alia*, completion work was performed by an allegedly unlicensed contractor. Mr. Hart explains that such a payment would violate the "long standing practice of the Commission not to award money from the Guaranty Fund to cover work completed by an unlicensed contractor." Mr. Hart goes on to explain that the Claimant's claim will be forwarded to the OAH for a hearing.

Line 12 of 14 of this form instructs claimants to submit to the MHIC the original contract, any receipts, and any estimates for work to complete the contract. Line 12 also instructs claimants to “[s]ubmit only estimates from licensed MHIC Contractors.” The MHIC website, under Frequently Asked Questions, instructs claimants to submit bids only from licensed contractors. See <https://www.dllr.state.md.us/license/mhic/mhicfaqgf.shtml#repair>

However, neither the applicable provisions of the Business Regulation article nor the applicable COMAR provisions make any mention that hiring an unlicensed contractor to complete an incomplete home improvement contract will invalidate a claim against the Fund. The Claimant did not take into consideration when he hired Jerry Smith Contracting whether Jerry Smith did or did not have a MHIC license. Jerry Smith was a licensed MHIC contractor for twenty-two years, and therefore the amount he charged the Claimant to complete the contract is a reasonable measure of the Claimant’s actual loss.

The MHIC must also consider, in my view, that the Respondent refused to return to work on the contract when he had already collected \$45,832.00 against a \$55,000.00 contract with several weeks of work to be done and thousands of dollars’ worth of supplies remaining to be purchased. To allow the Respondent to suffer no consequence for this conduct is fundamentally unfair.

Thus, I recommend an award.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$37,232.51 as a result of the Respondent's acts or omissions.

I conclude in the alternative, in the event the labor portion of the amount paid to Jerry Smith Contracting is disallowed as a matter of MHIC practice, the Claimant’s actual

compensable loss is \$19,653.51, comprised of \$12,813.73 for materials purchased by the Claimant, plus \$6,839.78 for materials purchased by Jerry Smith Contracting, for which the Claimant reimbursed Jerry Smith Contracting. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund.

I further conclude, in the alternative, that in the event the labor portion of completion of the contract by Jerry Smith Contracting is disallowed, that the Claimant is entitled to recover \$19,653.51 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00.

In the alternative, I **RECOMMEND** the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$19,653.51; 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%) as set by the Maryland Home Improvement Commission;⁸ and

⁸ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

July 20, 2018
Date Decision Issued

Michael R. Osborn
Administrative Law Judge

MRO/emcl
173714

Handwritten text at the top of the page, possibly a title or header.

Handwritten text on the right side of the page.

Handwritten text in the middle-left section, possibly a signature or name.

Handwritten text in the middle-right section.

Small handwritten text or initials at the bottom right.

**IN THE MATTER OF THE CLAIM
OF MARTIN BARRETT**

*

**MARYLAND HOME IMPROVEMENT
COMMISSION**

*

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF RICHARD GARHART
t/a R.M. GARHART & SONS**

*

**MHIC CASE NO. 17(75)698
OAH CASE NO. DLR-HIC-02-18-03751**

*

*

* * * * *

PROPOSED ORDER

**WHEREFORE, this 17th day of September, 2018, the Maryland Home
Improvement Commission ("Commission") ORDERS that:**

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.**
- 2) The Conclusions of Law of the Administrative Law Judge are Amended as follows and otherwise Affirmed:**

A) The Commission's Guaranty Fund is paid for by fees assessed on all licensed home improvement contractors in the State. Furthermore, pursuant to Maryland Annotated Code, Business Regulation Article, § 8-601(a)-(d) it is a misdemeanor in Maryland to act as a home improvement contractor without a license. Therefore it is a long standing practice of the Commission 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.

B) Because it is undisputed that the Claimant hired an unlicensed contractor to correct and complete the work done by the Respondent, the Commission will not consider the amounts paid by the Claimant to the unlicensed contractor for labor in its calculation of actual loss. The Commission will, however, consider the cost in materials incurred by the Claimant to correct and complete the work of the Respondent in its calculation of actual loss.

C) Utilizing the following formula specified in COMAR 09.08.03.03B(3)(c), the Commission finds the actual loss to be as follows:

i) Amount Paid to the Respondent: \$45,832.00

PLUS

ii) Cost to Correct and/or Complete the Work \$19,653.51
(Amount paid for Materials Only)

MINUS

iii) Original Contract Price: \$55,000.00

EQUALS

iv) Actual Loss: \$10,485.51

3) The Recommended Order of the Administrative Law Judge is Amended as follows and otherwise Affirmed:

A) The Claimant is awarded \$10,485.51.

4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file a petition for judicial review to Circuit Court.

Lawrence Helminiak

Panel B

Maryland Home Improvement
Commission

**IN THE MATTER OF THE CLAIM
OF MARTIN BARRETT**

*

**MARYLAND HOME IMPROVEMENT
COMMISSION**

*

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF RICHARD GARHART t/a
RICHARD M. GARHART & SONS**

*

**MHIC CASE NO. 17(05)698
OAH CASE NO. DLR-HIC-02-18-03751**

*

*

* * * * *

FINAL ORDER

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on May 2, 2018. Following the evidentiary hearing, the ALJ issued a Proposed Decision on July 20, 2018, concluding that the homeowner Martin Barrett (“Claimant”) sustained an actual and compensable loss of \$20,000, or in the alternative \$19,653.51, as a result of the acts and omissions of Richard Garhart t/a Richard M. Garhart & Sons (“Contractor”). *ALJ Proposed Decision* p. 16. In a Proposed Order dated September 17, 2018, the Maryland Home Improvement Commission (“MHIC”) affirmed the Proposed Decision of the ALJ in part, but amended the amount of the award from the MHIC Guaranty Fund down to \$10,485.51. The Contractor subsequently filed exceptions of the MHIC Proposed Order to be heard before a three-member panel (“Panel”) of the MHIC.

A hearing on the Contractor’s exceptions was originally set for November 15, 2018. The Contractor requested a postponement that was granted and the hearing was rescheduled to January 17, 2019. Present at the January 17, 2019 hearing was the Claimant, and Assistant Attorney General Hope Sachs on behalf of the MHIC. The morning of the hearing, the Contractor spoke via telephone with an administrative assistant from the Office of the Attorney General and indicated that he could not attend the hearing because he had the flu. The Claimant and Ms. Sachs were informed of the Contractor’s message at the hearing and told that the Contractor would be

given the opportunity to provide written documentation proving that his illness prevented him from attending the hearing. On January 18, 2019, advice counsel for the MHIC sent a letter to the Contractor via regular mail, certified mail, and email, providing him until January 24, 2019 to submit written documentation from a healthcare provider certifying that his illness prevented him from attending the hearing. The Contractor failed to provide any response to this letter. Therefore, the MHIC is not issuing a new hearing notice, and through this Final Order, rules on the written exceptions submitted by the Contractor.

In his written exceptions, the Contractor claims that the ALJ erred by disregarding the Claimant's alleged breach of certain terms of the contract, yet the Contractor does not identify what terms of the contract he is referring to. In addition, the Contractor contends that the receipts for material used in the calculations for the Proposed Order are inconsistent with the original scope of work to be done under the contract, but does not specify what items paid for to correct his work go beyond the scope of the original contract. Lastly, the Contractor disputes the findings of fact made by the ALJ regarding who was responsible for the delay in the work, and whether the Contractor was allowed to substitute the Trex decking specified in the contract for GeoDeck brand decking. The ALJ's findings that the Contractor could have completed other items while awaiting the relocation of the electrical box, and that the Contractor did not have the Claimant's approval to switch the brand of decking used, are based on his assessment of the testimony of the witnesses at the hearing. If the Contractor wanted the MHIC to consider the testimony presented at the hearing before the ALJ, he was responsible for providing the MHIC with a copy of the transcript of the hearing, which he has not done. COMAR 09.01.03.09H. Moreover, the ALJ was tasked with observing the demeanor of the witnesses as they testify, judge their credibility, and ultimately make findings of fact based on this testimony. The Panel will not overturn the credibility

determinations of the ALJ in this case.

The ALJ's decision is thorough, supported by the evidence in the record, and correct as a matter of law. Except for the calculation of the award amount that was amended in the Proposed Order, the Panel does not find that the ALJ erred in his decision, and will not overturn it on exceptions. Having considered the evidence contained in the record, the ALJ's Proposed Decision, and the MHIC's Proposed Order it is this **13th day of February 2019 ORDERED:**

- A. That the Proposed Order of the MHIC is **AFFIRMED**;
- B. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Jeffrey Ross
Chairperson –Panel
Maryland Home Improvement
Commission