

**IN THE MATTER OF THE CLAIM
OF KENNETH CARNEGIE**

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**MARYLAND HOME IMPROVEMENT
COMMISSION**

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF STEPHEN TATE t/a
REAL ESTATE FOR LIFE
ORGANIZATION, LLC**

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**MHIC CASE NO. 17(05)923
OAH CASE NO. DLR-HIC-02-18-20847**

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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 October 24, 2018. The homeowner, Kenneth Carnegie (“Claimant”), was present at the hearing, but the contractor, Stephen Tate t/a Real Estate For Life Organization, LLC (“Contractor”), failed to appear. Following the evidentiary hearing, the ALJ issued a Proposed Decision on January 11, 2019, concluding that the Claimant sustained an actual and compensable loss of \$20,000.00 as a result of the acts and omissions of the Contractor. *OAH Proposed Decision* p. 10. In a Proposed Order dated February 22, 2019, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to award the Claimant \$20,000.00 from the MHIC Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On June 6, 2019, a hearing on the exceptions filed in the above-captioned matter was held before a three-member panel (“Panel”) of the MHIC. The Claimant was present without counsel. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The Contractor did not appear despite the issuance of proper notice of the hearing. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ, and therefore the Panel’s review of the record was limited to the ALJ’s recommended decision and the exhibits introduced into evidence at the OAH hearing. COMAR

09.01.03.09(G) - (I).

The Contractor argues in his written exceptions that he failed to appear at the OAH hearing below because he did not receive notice of the hearing. The ALJ addressed the Contractor's failure to appear in her decision, and correctly found that the Contractor was provided sufficient notice of the hearing before OAH and proceeded with the case in his absence. *OAH Proposed Decision* p. 2. The claim against the Guaranty Fund was delegated to OAH for a contested case hearing. The type of notice to be provided to a party in such a hearing is governed by the Administrative Procedure Act. COMAR 09.01.03.05A. The Administrative Procedure Act at Annotated Code of Maryland, State Government Article, § 10-208 states that "[a]n agency or the Office shall give all parties in a contested case reasonable written notice of the hearing." At State Government Article, § 10-209, the Administrative Procedure Act goes on to allow service of a notice of hearing on a licensee via regular mail if the licensing law requires the licensee to provide his address to the agency and the agency has been unsuccessful in giving notice in the manner otherwise specified in the licensing statute. The Commission's statute specifies that "[t]he 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." Annotated Code of Maryland, Business Regulation Article, § 8-312(d). Licensees are also required to notify the Commission of any changes in their address within 10 days of that change. Annotated Code of Maryland, Business Regulation Article, § 8-310; COMAR 09.08.01.11.

Notice of the hearing was sent to two different addresses for the Contractor via both certified and regular mail. Although the certified mail was unclaimed, the regular mail was not returned from either address. *OAH Proposed Decision* p. 2. One of the addresses used to notify the Contractor of the OAH hearing was 9817 Marriotsville Road, Randallstown, MD 21133. *OAH*

Hearing Guaranty Fund Exhibit 2. This address is the business address the Contractor kept on record with the MHIC. *OAH Hearing Guaranty Fund Exhibit 4.* Clearly this address remains valid because the Contractor uses it in the signature line of his written exceptions. *Exceptions Hearing Exhibit 2.* The Court of Special Appeals has held that the notice of hearing sent to a licensee was sufficient when sent via both certified and regular mail to the last known address the licensee provided to the agency. *Maryland State Bd. Of Nursing v. Sesay*, 224 Md. App. 432 (2015). The Court found that this form of notice was sufficient even when both the certified and regular mail were returned as undeliverable. *Maryland State Bd. Of Nursing v. Sesay*, 224 Md. App. at 446-47, 456. In this case, although the certified mail was returned unclaimed, the regular mail sent to the Contractor's two addresses was not returned as undeliverable. Under the applicable law governing notice in these cases, the mailing of the hearing notice to the business address the Contractor kept on file with the Commission via both certified and regular mail constituted reasonable written notice of the hearing, and the Commission will not remand this matter due to the Contractor's failure to appear.

The remainder of the Contractor's written exceptions consists of his version of the facts and his claim that he has evidence and witnesses to support his contentions. The Commission cannot consider the additional evidence raised in the Contractor's exceptions because it exists outside the record generated at the hearing below. COMAR 09.01.03.09K. The Contractor's opportunity to present testimony, evidence and witnesses was at the evidentiary hearing before OAH.

The ALJ's decision is thorough, supported by the evidence in the record and correct as a matter of law. The Commission does not find that the ALJ erred in her decision and therefore will not overturn it on exceptions. Having considered the parties' arguments, the evidence contained

in the record, and the ALJ's Recommended Decision, it is this **11th** day of **September 2019**

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 Proposed Decision and Recommended 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.

Joseph Tunney
Chairperson –Panel
Maryland Home Improvement
Commission

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IN THE MATTER OF THE CLAIM
OF KENNETH CARNEGIE,
CLAIMANT

AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF STEPHEN TATE,
T/A REAL ESTATE FOR LIFE
ORGANIZATION, LLC,

RESPONDENT

* BEFORE DEBORAH S. RICHARDSON,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-20847
* MHIC No.: 17 (05) 923

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On November 16, 2017, Kenneth Carnegie, on behalf of KKD Investments, LLC (Claimant)¹ filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,400.00 in actual losses allegedly suffered as a

¹ Kenneth Carnegie is a fifty percent owner of KKD Investments, LLC. Both the Complaint and the Claim Form filed in this case listed KKD Investments as the Complainant and were signed by Kenneth Carnegie. The transmittal to the OAH listed Kenneth Carnegie as the Claimant. Claimant is not a defined term in the relevant statute. The statute at issue here provides that 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). "Owner" includes 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). Thus, although the Claim was brought in the name of KKD Investments, LLC, Mr. Carnegie contracted for and was entitled to the home improvement at issue in this case and is an "owner" within the meaning of the statute. I will use the term "Claimant" hereinafter to refer to both Mr. Carnegie and KKD Investments, LLC.

result of a home improvement contract with Stephen Tate, trading as Real Estate for Life Organization, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 2, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on October 24, 2018 at the LaPlata Public Library in LaPlata, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented himself. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

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. 2018); 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 the compensable loss?

² Notice of the hearing was mailed to the Respondent at two different addresses of record by regular and certified mail on September 10, 2018. COMAR 09.08.03.03A(2). The notices sent via certified mail were both returned as unclaimed to the OAH. The notices sent via regular mail were not returned. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent received proper notice, and proceeded to hear this matter.

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Real Estate for Life LLC estimate, undated
- Clmt. Ex. 2 - Checks from Claimant to Respondent, dates ranging from September 6, 2016 to September 12, 2016
- Clmt. Ex. 3 - Check from Claimant to Respondent, October 1, 2016
- Clmt. Ex. 4 - Check from Claimant to Respondent, October 20, 2016
- Clmt. Ex. 5 - Complaint Form, January 26, 2017
- Clmt. Ex. 6 - DLLR Certification, August 10, 2015
- Clmt. Ex. 7 - Notarized letter from Claimant and Respondent To Whom It May Concern, February 25, 2017
- Clmt. Ex. 8 - Letter from Claimant and Respondent To Whom It May Concern, April 7, 2017
- Clmt. Ex. 9 - Letter from Charles Hinkel, Magnum Home Services to Claimant, April 14, 2017
- Clmt. Ex. 10 - Photographs, printed October 19, 2018
- Clmt. Ex. 11 - ATM receipts, dates ranging from April 20, 2017 to May 1, 2017
- Clmt. Ex. 12 - Screenshot of text message, printed October 19, 2018
- Clmt. Ex. 13 - Photographs, undated

The Respondent did not appear and did not offer any exhibits for admission into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, June 28, 2018
- Fund Ex. 2 - Notice of Hearing, September 10, 2018
- Fund Ex. 3 - MHIC Claim Form, November 16, 2017

Fund Ex. 4 - MHIC Licensing history, printed September 18, 2018

Fund Ex. 5 - Real Property Data Search, undated

Testimony

The Claimant testified and presented the testimony of Shiva Balkaran, the other fifty percent owner of KKD Investments, LLC.

The Respondent did not appear and therefore did not present any testimony.

The Fund did not present any testimony.

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 99498.
2. On or about September 12, 2016, the Claimant and the Respondent entered into a contract to do a complete interior demolition and renovation of a then-vacant property on East Eager Street in Baltimore, Maryland (Contract). The Contract provided the Respondent would perform demolition and clean out, roof installation, framing, siding, installation of a two-zone HVAC system, electrical, plumbing, insulation, drywall, doors, trim, molding, windows, painting and finishes.
3. The original agreed upon Contract price was \$ 70,000.00.
4. The Claimant paid the Respondent \$6,000.00 when they entered into the Contract in order for the Respondent to begin work. Soon after the parties entered into the Contract in September 2016, the Respondent began demolition work under the Contract.
5. After the Respondent completed portions of the demolition, the Claimant paid the Respondent an additional \$4,000.00.

6. The Claimant then noticed the work began to slow down. The Claimant called the Respondent, who stated he needed additional money in order to continue with the work. The Claimant paid the Respondent an additional \$20,000.00.

7. The Respondent did no work under the Contract from October 20, 2016 until January 2017. The Respondent at times told the Claimant he had been incarcerated, was in Texas, and was going through a divorce.

8. The Claimant filed a complaint with MHIC on January 26, 2017.

9. The parties met on February 25, 2017. The Respondent admitted he had used the Claimant's money for other projects. The Respondent promised to work all of the money off once he was back on his feet. The Claimant decided to give the Respondent another chance.

10. On February 25, 2017, the parties entered into an addendum to the Contract outlining how the Respondent would pay back the funds already advanced. Under the addendum, the Claimant agreed to provide materials and two dumpsters for the Respondent to complete the renovation. The Respondent agreed to pay back that advance.

11. The Claimant provided a dumpster and materials on the work site at a cost of \$7,500.00.

12. The Respondent performed very little work after March 1, 2017.

13. Between April and May 2017, the Respondent continued to demand additional money. During that time period, the Claimant deposited \$2,450.00 into the Respondent's bank account.

14. The Claimant paid the Respondent the following amounts, totaling \$32,450.00:

September 9, 2016 \$1,000.00 (check)

September 9, 2016 \$5,000.00 (check)

October 1, 2016 \$4,000.00 (check)

October 20, 2016 \$20,000.00 (check)

April – May, 2017 \$2,450.00 (cash deposits into checking account)

15. In April 2017, after still having performed very little work under the Contract, the Respondent asked the Claimant for an additional \$3,000.00.

16. The Respondent performed some demolition and framing under the Contract. The demolition and framing portions of the Contract accounted for \$11,000.00 of the \$70,000.00. The Respondent did not perform any portion of any of the other items to be performed under the Contract.

17. Sometime after April 2017, the Claimant paid Magnum Home Services \$39,300.00 to complete the demolition, exterior framing, and roofing. The \$39,300.00 did not cover the exact same scope of work as the Claimant's Contract with the Respondent.

18. The Claimant later paid other contractors over \$100,000.00 to complete the project. The additional \$100,000.00 included items that were not included in the original Contract with the Respondent, including kitchen fixtures and appliances.

DISCUSSION

In this case, 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).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)).

³ 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)⁴; *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” 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. There are no statutory impediments to the Claimant collecting from the Fund, such as being related to the Respondent.

It is clear the Respondent performed unworkmanlike, inadequate or incomplete home improvement. Specifically, the Respondent performed an incomplete home improvement, as he abandoned this project after being paid a significant advance by the Claimant. The terms of the original Contract were not in writing. Instead, the parties verbally agreed to the scope of work contained in a \$70,000.00 estimate provided by the Respondent. (Cl. Ex. 1). The Claimant wrote the first two checks to the Respondent on September 12, 2016. After demolition began, the Claimant paid the Respondent another installment. When work had slowed down substantially by mid-October, the Claimant paid the Respondent yet another sizeable installment.

Yet work never fully resumed on the project. Over the ensuing months, the Respondent would disappear for weeks at a time. He told the Claimant he had been incarcerated and at one point was in Texas, neither of which the Claimant was able to confirm. The Respondent told the Claimant his child was sick and he was going through a divorce. He admitted he used the funds advanced by the Claimant on other projects and demanded more money to pay his rent, pay for

⁴ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

his car, and get back on his feet to finish the project. The Claimant testified sincerely and credibly that he tried continually to work with the Respondent to get him to finish the job. The Respondent made barely any progress past what he had done by October 2016, which was part of the demolition and framing. It was perfectly reasonable for the Claimant to determine by the end of April 2017, six months after the parties entered into the Contract, with only a fraction of the work done, that the Respondent had abandoned the project.

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. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work:

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)-(c).

However, none of the three regulatory formulas is appropriate in this case. Subsection (a) is not applicable because although the Respondent abandoned the project, he did perform some work under the Contract. Subsection (b) is not applicable because the Claimant did solicit other contractors to complete the Contract. Subsection (c) is applicable, but unworkable, to calculate loss in this case. The Respondent did some work under the Contract and the Claimant solicited other contractors to complete the work. However the Claimant was unable to prove by a preponderance of the evidence the reasonable amounts paid to another contractor to complete the project, because the subsequent contracts he entered into did not have an identical scope of work to the original Contract.

Accordingly, I shall apply a unique formula to measure the Claimant's actual loss. The original Contract between the Claimant and Respondent was for \$70,000.00. According to the Claimant's credible testimony and the pictures taken in April 2017, the only work performed by the Respondent was on the demolition and framing. The contract allowed for \$11,000.00 for demolition and framing. Even assuming the Respondent had entirely completed these two items, there was still \$59,000.00 worth of work outstanding on the contract. Without even taking into consideration the \$7,500.00 in materials the Claimant paid for in April 2017, the Claimant paid the Respondent \$32,450 in checks and cash deposits. Thus, the Claimant paid the Respondent \$32,450.00 for at most \$11,000.00 worth of work. This means the Claimant suffered an actual loss of \$21,450.00. Although counsel for the Fund utilized a different method in arriving at an actual loss, she agreed the Claimant suffered an actual loss well over \$20,000.00.

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 \$21,450.00 exceeds

\$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$21,450.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. 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; 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;⁵ and

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

Signature on File

January 11, 2019
Date Decision Issued

Deborah S. Richardson *on*
Administrative Law Judge *(AOL)*

DSR/cj
#177090

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 22nd day of February, 2019, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION