

**IN THE MATTER OF THE CLAIM
OF SHAWN CRIBB,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOHN SWITALA, SR.,
T/A BUILD IT RIGHT, LLC
RESPONDENT**

*** BEFORE JOY L. PHILLIPS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: LABOR-HIC-02-19-23338
* MHIC No.: 18 (05) 1239
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 29, 2018, Shawn Cribb (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$84,396.56 in actual losses allegedly suffered as a result of a home improvement contract with John Switala, Sr., trading as Build It Right, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On July 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ References to the Business Regulation Article cite the 2015 volume of the Maryland Annotated Code.

I held a hearing on October 31, 2019, at the Department of Natural Resources, Annapolis, Maryland. Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented himself. After waiting fifteen 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.³

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. 2019); 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?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Copy of texts from the Respondent, May 15, 2018
- Clmt. Ex. 2 - Payments Summary, undated
- Clmt. Ex. 3 - Proposal/contract, signed November 11, 2014 (26 pages)
- Clmt. Ex. 4 - Email from Damon Cogar to the Claimant, March 11, 2015, with attachments
- Clmt. Ex. 5 - Canceled checks paid to the Respondent, November 17, 2014 to June 20, 2015
- Clmt. Ex. 6 - Photographs of house taken November to December 2015 (10 pages)
- Clmt. Ex. 7 - Canceled check for permit, April 11, 2015
- Clmt. Ex. 8 - Invoice from Apex Construction & Sheet Metal, December 15, 2015

² On July 1, 2019, the Maryland Department of Labor, Licensing and Regulation became the Department of Labor.

³ Notices of the hearing were mailed to the Respondent at several addresses of record by regular and certified mail. On September 24, 2019, a Notice of Hearing was sent to the Respondent at 697 C. Street, Pasadena, MD 21122, Code of Maryland Regulations (COMAR) 09.08.03.03A(2), and not returned as undeliverable, although the certified mail was returned as unclaimed on November 1, 2019. 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 had received proper notice, and proceeded to hear the matter.

- Clmt. Ex. 9 - Invoice from J O Contractors, February 29, 2016, with quotes and canceled checks
- Clmt. Ex. 10 - Home Depot receipts, December 6, 2015
- Clmt. Ex. 11 - Invoice from Greenland Construction Group, November 14, 2017, with canceled checks
- Clmt. Ex. 12 - Contract with Custom Works, Inc., August 19, 2017, with canceled check
- Clmt. Ex. 13 - Proposal, invoice, and receipt for Alpha Plumbing, September 26, 2017
- Clmt. Ex. 14 - HVAC Enterprises estimate, December 8, 2017, with canceled checks
- Clmt. Ex. 15 - Canceled checks to Ryan Moyer, January 8 – February 10, 2018.
- Clmt. Ex. 16 - Proposal from DeVere Insulation Company, April 2, 2018, with receipt
- Clmt. Ex. 17 - Complaint and Summary, May 22, 2018
- Clmt. Ex. 18 - Various quotes from contractors

The Respondent did not attend the hearing and did not offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, July 9, 2018
- Fund Ex. 2 - Notice of Hearing, September 24, 2019 (with the Respondent's corrected address)
- Fund Ex. 3 - Notice of Hearing, September 17, 2019
- Fund Ex. 4 - Notice of Hearing, September 9, 2019
- Fund Ex. 5 - Notice of Hearing, August 26, 2019
- Fund Ex. 6 - Letter to the Respondent from the HIC, November 19, 2018, with Claim Form
- Fund Ex. 7 - Licensing information, printed September 16, 2019
- Fund Ex. 8 - Affidavit of Charles Corbin, September 25, 2018
- Fund Ex. 9 - Letters from David R. Finneran, HIC, October 3, 2019, re: Apex Construction & Sheet Metal and Hector Moscoso
- Fund Ex. 10 - Letter from David R. Finneran, HIC, October 3, 2019, re: J O Contractors

Testimony

The Claimant testified. Neither the Fund nor the Respondent offered any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-87981. The Respondent's license expired on March 30, 2018.
2. In November 2014, the Claimant purchased a home (Property) in Crownsville, Maryland, that he intended to renovate.

3. On November 17, 2014, the Claimant and the Respondent entered into a contract to substantially renovate the first floor, add a second floor, and generally improve the Property (Contract). The Respondent was also responsible for obtaining the correct permits.

4. The original agreed-upon Contract price was \$165,000.00.⁴

5. The Claimant paid the Respondent by check in the following amounts:

November 17, 2014 \$ 15,000.00

November 17, 2014 \$ 50,000.00

February 6, 2015 \$ 20,000.00

April 18, 2015 \$ 25,000.00

April 27, 2015 \$ 25,000.00

June 20, 2015 \$ 20,000.00

Total payments: \$155,000.00

6. Between November 2014 and December 2015, the Respondent tore out walls, fixtures, and some flooring, reframed rooms, and put on a new roof with shingles. He removed the HVAC system. He installed one rough staircase. He did not install insulation, build a roof over a porch/door area, or install windows and doors. He did put up plastic sheathing⁵ on the Property, but did not install vinyl siding.

7. The Claimant paid the Respondent ahead of the draw schedule, at the request of the Respondent.

8. The Respondent did not complete any more work on the Property after December 20, 2015. The Claimant continued to talk to him throughout 2016 in an effort to have the Respondent return and complete the job, to no avail. The Respondent told the Claimant he was

⁴ This included \$10,000.00 for sprinklers, which ended up not being required by the county.

⁵ Brand name TYPAR

trying to raise the money to finish the job. The Property was uninhabitable when the Respondent abandoned the job.

9. To complete the work left abandoned by the Respondent, the Claimant paid the following licensed companies⁶:

Greenland	\$ 3,898.00	(leveled and repaired floors)
Custom Works, Inc.	\$ 5,900.00	(completed deck)
Alpha Plumbing	\$14,040.00	(rough in plumbing and finishing)
HVAC Enterprises	\$15,732.00	(installed new HVAC)
JDL Electric	\$ 8,500.00	(wired house and installed switches)
DeVere Insulation	<u>\$ 2,145.49</u>	(insulation)
Subtotal:	\$50,215.49	

10. The Claimant paid \$3,500.05 for doors from Home Depot and \$7,124.40 for windows from Lansing. The company J O Contractors, licensed in Virginia but not in Maryland, installed the doors and windows. J O Contractors also installed siding, gutters, soffits, and trim. The Claimant paid J O Contractors \$26,006.00 between December 6, 2015 and February 29, 2016.

11. On December 15, 2015, the Claimant paid \$4,200.00 to APEX, a company not licensed in Maryland, to finish a small deck that was collapsing due to water damage. The water was pulling the deck away from the house and impacting the interior of the Property.

12. The Claimant bought and installed the kitchen cabinets, toilets, and sinks.⁷ He also obtained his own building permit on April 11, 2015, at a cost of \$431.75.

⁶ I have not listed payments made to two companies that are not licensed with the Maryland Home Improvement Commission (See Findings of Fact 10-11).

⁷ No receipt for these items was submitted at the hearing.

13. The total paid to complete the job abandoned by the Respondent includes payments made to licensed contractors, supplies purchased for which there are receipts, and the building permit:

\$50,215.49 (payments to licensed contractors)

\$ 3,500.05 (cost of doors)

\$ 7,124.40 (cost of windows)

\$ 431.75 (permit)

Total: \$61,271.64

14. The Respondent notified the Claimant throughout 2016 that he was having financial difficulties. His final text, on May 15, 2018, revealed that his own house had been sold, he was declaring bankruptcy, and the Claimant could call his attorney for further questions.

15. The Claimant received his occupancy permit in July 2019.

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); 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); *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. His license has since expired. The Claimant testified he was told the job would be completed in three to six months. Thirteen months after the Contract was signed, the Respondent had demolished the inside of the Property, reframed new walls on the first floor, added a second floor, and installed a new roof. At the Claimant’s insistence, the Respondent returned in December 2015 to install a rough stairway from the first to the second floor. He did not return to the Property after that.

The Respondent notified the Claimant throughout 2016 that he was having financial difficulties. On May 15, 2018, the Respondent texted the Claimant that his own house had been sold, he was declaring bankruptcy, and the Claimant could call his attorney for further questions. The evidence overwhelmingly shows that the Respondent abandoned the Contract in December 2015, leaving the Claimant with an uninhabitable home.

The Claimant responded by becoming his own contractor. He obtained various estimates for the work needed to complete the Contract, hired sub-contractors to complete the work, and did much of the finishing work himself. He testified that he sold his car and everything he owned to raise the funds needed to complete the work. He continued making mortgage payments on the home despite not being able to live in it until the summer of 2019. In the meantime, he lived with a friend.

I conclude that the Claimant is eligible for compensation from the Fund because the Respondent abandoned the Contract.

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.

In this case, the Respondent performed some work under the contract, and the Claimant retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

Thus, the Claimant's actual loss would be calculated as follows:

Amount paid to Respondent	\$155,000.00
Plus amount paid to complete Contract	<u>+ \$62,271.64</u>
Subtotal:	= \$216,271.64
Minus Contract price	<u>-\$165,000.00</u>
Actual loss	\$ 51,271.64

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 \$51,271.64 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).⁸

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss \$51,271.64 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)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(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;⁹ and

⁸ The Fund agreed the Claimant was entitled to reimbursement and there was some discussion regarding what amounts should be included or excluded in the actual loss total. The Fund also agreed, however, that however one calculates the actual loss, it far exceeds the statutory maximum of \$20,000.00. Thus, it was not arguing for the actual loss to be a particular amount.

⁹ 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.

December 19, 2019
Date Decision Issued

JLP/sw
#183041


Joy L. Phillips
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 10th day of February, 2020, 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.

Robert Altieri

Robert Altieri

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

