

IN THE MATTER OF THE CLAIM OF
RHONDA G. COHEN
AGAINST THE
MARYLAND HOME IMPROVEMENT
GUARANTY FUND ON ACCOUNT OF
HOME IMPROVEMENT WORK
UNDERTAKEN BY
ANTHONY VARRIALE, T/A
ATM MECHANICAL, INC.

* BEFORE STEPHEN J. NICHOLS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH NO.: DLR-HIC-02-09-43051
* MHIC NO.: 06 (75) 1745
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

This case arose because of a complaint filed by Rhonda G. Cohen (Claimant) with the Maryland Home Improvement Commission (MHIC) against Anthony Varriale t/a ATM Mechanical, Inc. (Respondent). The complaint asserts that the Claimant entered into a contract with the Respondent for the remodeling of a bathroom at her residence. The complaint alleges that the Respondent's performance of the work was inadequate and unworkmanlike.

On December 30, 2008, the Claimant filed a claim with the MHIC seeking to recover \$7,366.08 from the Home Improvement Guaranty Fund (Fund).¹ On October 9, 2009, the MHIC issued an order for a hearing on the claim against the Fund.

On August 25, 2010, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The hearing was conducted at the Wheaton hearing location of the Office of Administrative Hearings (OAH). The Claimant appeared and represented herself. Jessica Berman Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. The Respondent failed to appear at the hearing.

On June 3, 2010, the OAH had mailed notice of the hearing to the Respondent by certified and regular mail to Post Office Box 484, Walkersville, Maryland 21793, his last business address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2010).² The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned the certified mail to the OAH marked "Unclaimed." The U.S. Postal Service also returned the regular mail to the OAH marked "[Post Office] Box Closed." The Respondent's license with the MHIC expired on February 18, 2010. After the certified mail was returned, an investigator acting for the MHIC confirmed with the Motor Vehicle Administration (MVA) that the Respondent was a licensed driver in this State. As the Respondent is a licensed driver in this State, he is required to keep his address updated with the MVA. On July 20, 2010,

¹ During the hearing, the Claimant explained that she was confused by the language of the claim form and had entered \$7,232.16 on the form line reading "[e]nter claim amount from either 8 or 10." The Claimant listed the figure she had placed on line ten, but intended to list the figure she had placed on line 9. There was no opposition to the amendment of the claim from \$7,232.16 to \$7,366.08.

² "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2010).

a copy of the same OAH notice of the hearing was mailed to the Respondent by certified and regular mail to his home address of record on file with the MVA. The U.S. Postal Service did not return the regular mail, but did return the certified mail marked "Not Deliverable As Addressed Unable to Forward."

"If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2010). Since all reasonable notification alternatives had been exhausted, the ALJ directed the hearing to proceed in the Respondent's absence.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01; COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland, and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following items were admitted into the record:

Fund Exhibit #1 – Copies of the June 3, 2010 Notice of Hearing, the October 9, 2009 Hearing Order, envelopes, and a July 20, 2010 letter from Eric B. London, Assistant

Attorney General, Office of the Attorney General, Department of Labor,
Licensing and Regulation (twenty-five pages)

- Fund Exhibit #2 – Copy of a Transmittal, Hearing Order and Claim Form (four pages)
- Fund Exhibit #3 – A letter from Steven Smitson, Executive Director, MHIC, dated July 23, 2010, with a certified true test copy of an attachment (five pages)
- Fund Exhibit #4 – An affidavit from Michelle Escobar, with an attachment (three pages)
- Fund Exhibit #5 – Copy of a MHIC letter addressed to the Respondent with a copy of a Home Improvement Claim Form (three pages)
- Fund Exhibit #6 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on Walter Joseph Dustin, dated July 23, 2010
- Fund Exhibit #7 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on D & R Pazornick, LLC, dated July 23, 2010
- Claimant Exhibit #1A – Copy of a photograph of the Claimant's bathtub
- Claimant Exhibit #1B – Copy of a photograph of the Claimant's bathtub
- Claimant Exhibit #2 – Copy of a photograph of the Claimant's bathroom ceiling
- Claimant Exhibit #3 – Copy of a photograph of the Claimant's bathroom tile
- Claimant Exhibit #4 – Copy of a photograph of the Claimant's bathroom tile
- Claimant Exhibit #5 – Copy of a photograph of the Claimant's bathroom tile
- Claimant Exhibit #6A – Copy of a photograph of the Claimant's bathroom sink
- Claimant Exhibit #6B – Copy of a photograph of the Claimant's bathroom sink
- Claimant Exhibit #7 – Copy of a photograph of the Claimant's bathroom tile near the toilet
- Claimant Exhibit #8A – Copy of a photograph of the Claimant's bathroom toilet seat
- Claimant Exhibit #8B – Copy of a photograph of the Claimant's bathroom toilet seat
- Claimant Exhibit #9 – Copy of a photograph of the Claimant's bathroom toilet cover (lid)
- Claimant Exhibit #10 – Copy of a photograph of a vent in the Claimant's bathroom ceiling
- Claimant Exhibit #11 – Copy of a photograph of the Claimant's bathroom wall
- Claimant Exhibit #12 – Copy of a photograph of the Claimant's bathroom wall

Claimant Exhibit #13 – Copy of a photograph of shower head and tile on the Claimant's bathroom wall

Claimant Exhibit #14 – Copies of a January 13, 2006 complaint letter, business cards, a contract, a complaint form, a February 21, 2006 statement from [Walter Joseph] Dustin, correspondence, a June 22, 2007 Proposal from D & R Pazornick, LLC of damages, receipts, and a Claim Form (thirty-one pages)

No other exhibits were admitted into evidence.

B. Testimony

The Claimant testified in her own behalf. No other witnesses were called to testify.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license numbers 01-75788 and 05-120309 (trade name).
2. At all times relevant, the Claimant owned and lived at the residence located at 14609 Carona Drive, Silver Spring, Maryland (the property).
3. On November 7, 2005, the Claimant and the Respondent entered into a home improvement contract for the Respondent to remodel the hallway bathroom at the property. The Claimant wanted to remodel the bathroom because the bathroom subfloor and the ceiling below the bathroom had sustained damage as a result of a leak in the existing pipes.
4. Prior to the execution of the contract, the Respondent visited the property in order to view the water damage and provide an estimate for the work to be performed.
5. The contract price for the home improvement work was \$7,500.00.

6. On January 9, 2006, the Respondent commenced work on the home improvement project. The Respondent's workers were at the job site and performed work for four consecutive days. The last day the Respondent's workers performed work at the job site was January 12, 2006.

7. The Claimant paid \$6,500.00 to the Respondent for his work at the property. This was accomplished by a series of three charges (November 8, 2005, January 10, 2006, and January 11, 2006) made by the Respondent against the Claimant's credit card. After an initial \$2,500.00 deposit for the work, the Claimant authorized the Respondent to charge her credit card for the work performed in accordance with a draw schedule.

8. On each day when the Respondent's workmen were on the job, the Claimant observed what appeared to her to be discrepancies in the work that was being performed. The Claimant confronted the Respondent's workers on the job with her concerns about the work. The Respondent's workers repeatedly assured the Claimant that any concerns she had with their performance of the work would be fixed to her satisfaction.

9. On each day when the Respondent's workers were on the job, the Claimant telephoned the Respondent and informed him of her concerns with the work. Despite her daily requests that he inspect the progress of the work, the Respondent declined to visit the property. The Respondent repeatedly told the Claimant that her concerns about the work would be satisfied and that she should trust him to do the work correctly.

10. On the morning of January 13, 2006, the Claimant had two other contractors look at the progress of work in her bathroom. They advised her that the subfloor in the bathroom had not been replaced and that the floor the Respondent's workers had installed would have to be demolished and the rotted plywood underneath removed. The other contractors also confirmed

the Claimant's belief there were numerous workmanship discrepancies in the work that the Respondent's workers had performed.

11. During the afternoon of January 13, 2006, the Claimant contacted a scheduled painter, the Respondent's subcontractor, and told him not to come to the property because she was discontinuing the Respondent's services at the property.

12. The Respondent never came to the property to look at the work that had been performed by his workers and made no effort to address the Claimant's concerns about the work that his workers had performed.

13. On January 13, 2006, the following deficiencies existed with the work that the Respondent was required to perform at the property:

- a. The damaged subfloor under the bathroom had not been replaced.
- b. The bathroom floor that was installed was not level, the floor tiles along the tubline moved when a person's weight was added, and the tiles by the toilet were buckled.
- c. The plumbing of the pedestal sink was unprofessional and unworkmanlike.
- d. The tub installed by the Respondent was very inexpensive and unacceptable for remodeling a bathroom.
- e. The tiles used by the Respondent's workers for the floor to wall angle were regular tiles and were not the finished tiles made specifically for that bathroom area that the Claimant had bought and supplied at the job site.
- f. The installed toilet seat and cover were damaged with scratch marks.
- g. The drywall in the bathroom walls was not properly installed.

14. The fair market value of the cost to demolish the Respondent's work, where necessary, and repair and replace the poor work performed by the Respondent's workers and complete the remodeling of the Claimant's hallway bathroom as called for by the home improvement contract is \$9,500.00.

15. As part of the home improvement contract, the Claimant and Respondent agreed that the Claimant was to purchase various supplies and fixtures and deliver them to the job site for installation by the Respondent's workers. As of January 13, 2006, the Claimant had bought and delivered the following supplies and fixtures that were used by the Respondent's workers during their work:

<u>Amount:</u>	<u>Paid To:</u>	<u>For:</u>
\$470.24	The Home Depot	Tile
\$209.99	The Home Depot	Pedestal Sink
\$93.45	The Home Depot	LAV Faucet
\$92.40	The Home Depot	T/S Faucet

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2010).³ Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their "actual losses" from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(c)(1).⁴ A homeowner is authorized to recover

³ Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

⁴ Effective October 1, 2008, section 8-405(e)(1) of the Business Regulation Article was amended, raising the limit of recovery from the Fund from \$15,000.00 to \$20,000.00. Section 2 in Chapter 272 of House Bill 409 that raised

from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

An action against the Fund does not correspond to a civil claim (in an administrative setting) against an individual contractor for breach of contract. Recovery against the Fund is based on "actual loss" as defined by statute and regulation. "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. "By employing the word 'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629, 691 A.2d 699, 706 (1997). "The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2).

The Respondent failed to perform his obligations under the home improvement contract. The Claimant engaged the Respondent to remodel the bathroom because the bathroom subfloor and the ceiling below the bathroom had sustained water damage as a result of a leak in the existing pipes. The Respondent visited the property in order to view the water damage and provide an estimate for the work to be performed. That estimate became the basis for the home improvement contract. When work on the bathroom ceased, numerous discrepancies existed

the recovery limit reads, "[t]his Act shall be construed to apply to any claim pending before the Maryland Home Improvement Commission for which the Commission has not issued a final decision prior to the effective date of this Act."

with the work that the Respondent had been engaged to perform at the property. In addition to photographs displaying the discrepancies, the Claimant relied on an evaluation in a letter from Walter Joseph Dustin, a licensed MHIC contractor, who inspected the hallway bathroom shortly after the Respondent's work ceased. The evidence of the Respondent's incomplete and unworkmanlike performance is uncontradicted. The damaged subfloor under the bathroom had not been replaced. The bathroom floor that was installed was not level, the floor tiles along the tubline moved when a person's weight was added, and the tiles by the toilet were buckled. The plumbing of the pedestal sink was unprofessional and unworkmanlike. The installed tub was very inexpensive and unacceptable for remodeling a bathroom. The tiles used for the floor to wall angle were regular tiles and were not the finished tiles made specifically for that bathroom area that the Claimant had bought and supplied at the job site. The installed toilet seat and cover were damaged with scratch marks and the drywall in the bathroom walls was not properly installed.

As the damaged subfloor under the bathroom had not been replaced, much of the Respondent's work in the hallway bathroom must be demolished. The Claimant arranged for an estimate from D & R Pazornick, LLC, another licensed MHIC contractor, on the cost to demolish the Respondent's work, where necessary, and repair and replace the work and complete the remodeling of the Claimant's hallway bathroom as called for by the home improvement contract. D & R Pazornick, LLC, provided the Claimant with an estimate of \$9,500.00 and that is deemed to be the fair market value of the cost to repair and replace the Respondent's inadequate and unworkmanlike performance.

As part of the home improvement contract, the Claimant and Respondent agreed that the Claimant was to purchase various supplies and fixtures and deliver them to the job site for installation by the Respondent's workers. These supplies and fixtures included tile, faucets and a

pedestal sink. The Claimant presented receipts that she paid a combined cost of \$866.08 for the tile, faucets and pedestal sink. The pedestal sink can be reused, but the other supplies and fixtures cannot be reused in the repair/replacement effort. The Claimant paid \$656.09 for supplies and fixtures that cannot be reused. The \$656.09 the Claimant paid to suppliers in order to have her bathroom remodeled is also a proper measure of her actual loss. The Claimant's outlay for the remodeling of her bathroom was the \$6,500.00 she paid to the Respondent and \$656.09 paid (on the Respondent's behalf) for supplies/fixtures (to complete the original contract) for a combined total of \$7,156.09.

Because of the Respondent's "misconduct" described above, the Claimant has established an entitlement to reimbursement on her claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss" as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor 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) and COMAR 09.08.03.03B(3)(b) do not apply to this matter. The ALJ will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(c). The calculations follow:

\$ 7,156.09	Payments made to the Respondent or to complete the original contract
+ \$ 9,500.00	Cost to demolish, repair and complete the work
\$16,656.09	(Expenditure Subtotal)
- \$ 7,500.00	Contract Price
\$ 9,156.09	Actual Loss

The Claimant has an "actual loss" of \$9,156.09. Md. Code Ann., Bus. Reg. § 8-401.

In pertinent part, COMAR 09.08.03.02 reads:

...

C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

- (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
- (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

...

On December 30, 2008, the claim was filed against the Fund in the amount of \$7,366.08.

When the calculations are performed, the \$9,156.09 actual loss is more than the amount of the claim against the Fund. The Claimant obtained an estimate of the cost to demolish, repair and replace the work in her bathroom from D & R Pazornick, LLC, on June 22, 2007. There is no suggestion that the Claimant lacked sufficient information to determine the proper amount of her claim at the time it was filed as all the documentation upon which she relied to prove her case during the hearing was dated prior to December 30, 2008. The Claimant knew or should reasonably have been able to ascertain the facts on which her claim is based at the time the claim

was filed, and therefore, no amendment to the claim can be allowed under COMAR 09.08.03.02C(1). On May 15, 2008, the MHIC sent a letter to the Respondent informing him that a claim had been filed against the Fund in this matter and enclosing a copy of the claim form in the amount of \$7,366.08. Any amendment to the claim now would be prejudicial to the Respondent because it would increase his possible liability for Fund reimbursement and no notice of the proposed amendment was provided before he was sent notice of the hearing. COMAR 09.08.03.02C(2). As no amendment to the claim against the Fund should be allowed, the Claimant is entitled to reimbursement from the Fund in the amount of \$7,366.08.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has sustained an "actual loss" as a result of the Respondent's acts or omissions in the amount of \$9,156.09; yet, the award must be limited to \$7,366.08, the amount of the claim against the Fund. Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3); COMAR 09.08.03.02C.

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Maryland Home Improvement Commission:

ORDER, that the Claimant be awarded \$7,366.08 from the Maryland Home Improvement Guaranty Fund to compensate her for "actual losses" sustained by the "acts and omissions" of the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER, that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further.

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

October 25, 2010
Date Decision Mailed

SJN:sn
#116335v1



Stephen J. Nichols
Administrative Law Judge



STATE OF MARYLAND

DLLR

DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

IN THE MATTER OF THE CLAIM OF
RHONDA G. COHEN

v.

ANTHONY VARRIALE
t/a ATM MECHANICAL, INC.

* MARYLAND HOME
* IMPROVEMENT COMMISSION

* MHIC CASE NO. 06 (75) 1745

*

* * * * *

PROPOSED ORDER

WHEREFORE, this 15TH day of December, 2010, Panel B of the Maryland

Home Improvement 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:

A) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

B) The Administrative Law Judge found that the Claimant paid a total of \$6,500.00 to the Respondent. (Finding of Fact No. 7). Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the Commission may not award more than \$6,500.00 to the Claimant.

PHONE: 410.230.6309 • FAX: 410.962.8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
INTERNET: WWW.DLLR.STATE.MD.US • E-MAIL: MHIC@DLLR.STATE.MD.US

MARTIN O'MALLEY, GOVERNOR • ANTHONY G. BROWN, LT. GOVERNOR • ALEXANDER M. SANCHEZ, SECRETARY

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

A) The Claimant is awarded \$6,500.00 from the Home Improvement Guaranty Fund.

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 an appeal to Circuit Court.

Joseph Tunney
Chairperson - Panel B
Maryland Home Improvement Commission