

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF BERNARD MALONE,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF JONATHAN D.</b></p> <p><b>COOK, T/A LOW MAINTENANCE</b></p> <p><b>LANDSCAPING,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE RICHARD O’CONNOR,</b></p> <p><b>* ADMINISTRATIVE LAW JUDGE,</b></p> <p><b>* THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: DLR-HIC-02-14-28970</b></p> <p><b>* MHIC No.: 13 (90) 1168</b></p> <p><b>*</b></p>
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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
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PROPOSED CONCLUSION OF LAW  
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**STATEMENT OF THE CASE**

On January 30, 2014, Bernard Malone (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,505.00 in alleged actual losses suffered as a result of a home improvement contract with Jonathan D. Cook, trading as Low Maintenance Landscaping (Respondent).

I held a hearing on February 27, 2015 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Brennan W.

Walter, Esquire, represented the Claimant, who was present. The Respondent did not appear for the hearing despite receiving proper notice. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

### **ISSUES**

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the compensable amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

- Cl. Ex. 1. Low Maintenance Landscaping advertising hand-out.
- Cl. Ex. 2. Contract with the Respondent, March 18, 2011.
- Cl. Ex. 3. Contract with the Respondent, April 6, 2011.
- Cl. Ex. 4. Change Order, June 17, 2011.
- Cl. Ex. 5. Letter from the Claimant to the Respondent, September 30, 2011.
- Cl. Ex. 6. Proposal from Harford Tree Experts & Landscaping, February 8, 2012.
- Cl. Ex. 7. Proposal from Lerch Brothers, March 8, 2013.
- Cl. Ex. 8. Contract with Lerch Brothers, April 10, 2013.
- Cl. Ex. 9. Proposal from Masonry Repair Services, August 26, 2013.

Cl. Ex. 10. Complaint to the MHIC, April 19, 2013.

Cl. Ex. 11. Proposal from European Landscapes and Design, February 5, 2015.

Cl. Ex. 12A-O. Photographs of the Claimant's property and the Respondent's work.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1. Notice of Hearing, January 8, 2015.

Fund Ex. 2. Hearing Order, August 14, 2014.

Fund Ex. 3. The Respondent's licensing history with the MHIC, including Fund payouts and reimbursements; and license suspensions, flags, and renewals.

Fund Ex. 4. Affidavit of Charles Corbin, February 5, 2014.

Fund Ex. 5. Home Improvement Claim Form, January 30, 2014.

Fund Ex. 6. Letter from the MHIC to the Respondent, March 6, 2014.

### Testimony

The Claimant testified in support of the claim.

The Fund presented no 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 01-20233. His license has been suspended since October 2, 2013 for Fund payouts, and expired on May 5, 2014.

2. On March 18, 2011, the Claimant and the Respondent entered into a contract whereby the Respondent agreed to remove certain trees and shrubs from the Claimant's yard; trim and thin other trees; plant trees, shrubs, and other plants; provide topsoil and amend the existing soil; mulch the garden beds; build walls of stone and mortar on a concrete footer; and install a low-wattage lighting system.

3. The contract price was \$10,750.00.
4. The contract included warranties on the stonework and construction for two years, and on the plants for one year.
5. The contract stated that the work would begin in May 2011 with a deadline of June 5, 2011, weather permitting.
6. The Respondent did not start work until mid-June 2011 and continued working until July 1, 2011.
7. On June 17, 2011, the Claimant and the Respondent agreed on a change order whereby the Respondent would remove a spruce tree, trim two oak trees, and repair a porch, steps, and railings.
8. The price for the change order was \$1,400.00.
9. The Respondent completed the contract and the change order, and the Claimant paid \$12,150.00 under the contract and the change order.
10. On April 6, 2011, the Claimant and the Respondent entered into another contract for the Respondent to do some work at the Claimant's rental property. That contract was later cancelled.
11. The Claimant began noticing problems with the Respondent's work around the end of summer 2011.
12. Water accumulated near the right side Claimant's front porch where the Respondent installed a flower bed enclosed by a stone wall. The wall extends from the front porch around the right side of the house, ending in a semi-circle that is three or four feet high.
13. The Respondent did not build the concrete footer to support the wall as called for in the contract.

14. Many of the plants that the Respondent installed died within a few months.
15. The lighting system that the Respondent installed did not work – the lights kept blowing out.
16. The wall on the right side of the Claimant's house was not constructed properly. The mortar began to disintegrate within a few months, and the Respondent made no provision for drainage. Hydrostatic pressure behind the wall is causing the stones (which are now loose) to shift and will eventually lead to failure of the whole wall.
17. The Respondent also installed a lower wall to the left of the Claimant's front porch. This wall remains intact.
18. The Claimant began telephoning the Respondent when the problems with the work became apparent. The Claimant left messages with the Respondent's office staff and left voice mails. The Respondent never returned any calls and did not return to the property to inspect or repair the work.
19. The Claimant sent the Respondent a letter by certified mail on September 30, 2011. The Respondent did not pick up the certified mail.
20. On February 8, 2012, Harford Tree Experts gave the Claimant a proposal to clean out the dead shrubs and plants, prune three trees, and replace the lighting system for \$2,540.00.
21. The Claimant did not hire Harford Tree Experts.
22. On March 8, 2013, Lerch Brothers gave the Claimant a proposal to remove and rebuild the wall on the right side of the house for \$10,505.00.
23. On April 10, 2013, the Claimant contracted with Lerch Brothers to repair two sections of the wall, install a drain through the wall, remove dead plants installed by the Respondent, and plant replacement shrubs, flowers, and one tree.

24. The contract price with Lerch Brothers was \$2,687.06, which the Claimant paid.
25. On August 26, 2013, Masonry Repair Services, which is another company owned by Tom Lerch, gave the Claimant another proposal of \$10,505.00 to replace the entire wall.
26. On February 5, 2015, European Landscapes and Design gave the Claimant a proposal of \$10,650.00 to remove and replace the wall.
27. The Claimant has not had any additional work done on the wall or the garden beds because the cost is too great.

### DISCUSSION

#### The Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article, entitled "Hearings," states, in pertinent part, as follows:

(a) Except as otherwise provided in § 10-226 of the State Government Article, before the Commission takes any final action under § 8-311 of this subtitle, or if requested under § 8-620(c) of this title, it shall give the person against whom the action is contemplated an opportunity for a hearing before the Commission or, as provided under § 8-313 of this subtitle, a hearing board.

(b) The Commission shall give notice and hold the hearing in accordance with Title 10, Subtitle 2 of the State Government Article.

....

(d) 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.

....

(h) 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 (2015).

Although the above statute applies to disciplinary hearings against licensees, the MHIC uses the same procedures for hearings involving claims against the Fund, such as this case. These

procedures ensure, as much as possible, that a contractor against whom a claim is filed is made aware of the date, time, and place of the hearing.

The notice in this case went to the Respondent's address on record with the MHIC, in accordance with section 8-312(d), above. Although the Respondent is no longer licensed by the MHIC, an investigator, Charles Corbin, checked the Motor Vehicle Administration's records and found that the Respondent is still listed as residing at the address of record. Notices sent to the Respondent at that address by certified mail and by first-class mail were not returned undelivered. From all this information, I concluded that the Respondent received proper notice of the hearing and chose not to attend. Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h) (2015).

#### *The Merits of the Case*

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). *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." Bus. Reg. § 8-401 (2015). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor in 2011 at the time he entered into the contract with the Claimant and performed the work at the Claimant's home. His license has subsequently been suspended for Fund payouts (and ultimately expired), but that does not affect the claim in this case.

The evidence shows that the Respondent performed woefully unworkmanlike and inadequate home improvements. The main cause of the problems is the wall the Respondent built to contain the garden beds around the right side of the Claimant's house. This wall, according to the contract, was to be built on a concrete footer, but the Respondent did not install the footer. More importantly, the wall, although three or four feet high, has no provision for drainage. This means that hydrostatic pressure of many pounds per square inch will push against the wall from the inside and eventually cause it to fail. The lack of drainage also resulted in water accumulating behind the wall near the foundation of the house, which is probably what killed the plants the Respondent installed.

The Claimant noticed these inadequacies within two or three months of the completion of the work and made many attempts to have the Respondent return to address them. The Respondent was certainly aware of the Claimant's concerns, as the latter had left many messages with the Respondent's office staff and on voice mail. The Respondent never contacted the Claimant about the problems, essentially refusing to talk to him. The Claimant sent the Respondent a certified letter setting forth the complaints, but the Respondent ignored it.

Eventually, the Claimant realized that he would receive no satisfaction from the Respondent, and began inquiring about repairs by other companies. The evidence is convincing, based on these proposals, that the inadequacies of the Respondent's work can be resolved only by removing the existing wall and replacing it with a properly-constructed one. The Claimant received two proposals for this work – one from Lerch Brothers for \$10,505.00 and one from European Landscapes and Design for \$10,650.00.

The Claimant has already spent \$2,687.06 on Lerch Brother's emergency-type repair to the wall, which included installing a drain to prevent the wall's immediate collapse. Lerch



Brothers also repaired two sections where the mortar had crumbled and replaced the Respondent's dead plants. Still, replacement of the entire right-side wall is the only viable long-term solution.

Because of the money the Claimant has already paid to remedy the Respondent's poor workmanship, and the further sums that he will be required to pay in the future, I find that the Claimant is eligible for compensation from the Fund.

Turning to the amount of the award, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest.

COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c). The calculations under the above formula are as follows:

\$12,150.00	paid to the Respondent; plus
2,687.06	paid to Lerch Brothers to replace plants and install a drain; plus
<u>+10,505.00</u>	to replace the wall; equals
\$25,342.06	minus
<u>-12,150.00</u>	the original contract price; equals
\$13,192.06	actual loss.

However, the Business Regulation Article limits recovery from the Fund to the lesser of \$20,000.00 or the amount the Claimant actually paid to the Respondent. Bus. Reg. § 8-405(e)(1),

(5) (2015). The Claimant paid the Respondent \$12,150.00, so he cannot recover more than that amount.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$12,150.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,150.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>1</sup> and

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

**Signature on File**

May 26, 2015  
Date Decision Issued

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Richard O'Connor  
Administrative Law Judge

# 156223

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

**PROPOSED ORDER**

***WHEREFORE, this 19th day of June, 2015, 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.***

***Joseph Tunney***

***Joseph Tunney***

***Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**