

**IN THE MATTER OF THE CLAIM
OF CLARA BRISCOE**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF BRENNEN CALLOWAY
t/a GREEN ENERGY, LLC**

**MHIC CASE NO. 16(05)1182
OAH CASE NO. DLR-HIC-02-16-30807**

* * * * *

FINAL ORDER

On October 5, 2017, a hearing on the exceptions filed in the above-captioned matter was held before a three-member panel ("Panel") of the Maryland Home Improvement Commission ("MHIC"). The exceptions were filed by the contractor, Brennen Calloway t/a Green Energy, LLC, ("Contractor"), who was present without counsel. The claimant Clara Briscoe ("Claimant") was also present without counsel. Kris King, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC.

The matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings on April 5, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on June 23, 2017, concluding that the Claimant sustained an actual and compensable loss of \$4,000.00 as a result of the Contractor's acts and omissions. *ALJ Recommended Decision* p. 16. In a Proposed Order dated July 31, 2017, MHIC affirmed the Recommended Decision of the ALJ to award the Claimants \$4,000.00 from the Guaranty Fund. The Contractor subsequently filed exceptions of the MHIC Proposed Order, and a hearing was set before the Panel.

The Panel allowed the Contractor to present argument as to why the ALJ's decision should be overturned. Both in his written exceptions and at the hearing before the Panel, the

Contractor disputed the ALJ's factual findings that he did not provide the Claimant a copy of the contract, and that the Claimant notified the Contractor several times of her intention to cancel the contract during the three day rescission period. *See ALJ Recommended Decision* pp. 4-5. The Contractor argued that these findings were not based on evidence, but were based merely on the testimony of the Claimant and her daughter Sherdona Fryer, and as a result were not proven.

The testimony of a witness at a hearing is a form of evidence, and this case ultimately turns on the credibility determinations made by the ALJ. The Claimant and her daughter, Sherdona Fryer, testified at the hearing before the ALJ that the Contractor failed to provide the Claimant with a copy of the contract and that the Claimant notified the Contractor several times during the three day rescission period that she wanted to cancel the contract. *Transcript of OAH Hearing* pp. 16-18, 30, 33-34, 36, 39-42, 78, 80-81, 84. In his decision, the ALJ found the testimony of the Claimant and her witness to be more persuasive and credible than that of the Contractor. *ALJ Recommended Decision* pp. 10-11. On pages ten through twelve of his decision, the ALJ details why he finds the Claimant's version of events to be more persuasive than that of the Contractor. The ALJ references both the testimony of the parties as well as documentation such as the letter from SunTrust Bank that corroborates the testimony of the Claimant that she attempted on the day the contract was signed, February 23, 2016, to stop payment on the deposit check. *ALJ Recommended Decision* pp. 10-12; *Claimant Exhibit 2*. Because the ALJ observed the witnesses firsthand and found the testimony of the Claimant and her daughter to be more credible, the Commission will not overturn these credibility determinations. Therefore, the Commission finds that there is sufficient evidence supporting the findings made by the ALJ that the Contractor did not provide the Claimant with copies of the contract and that the Claimant informed the Contractor within three days of signing the contract

that she wished to cancel the contract.

Both parties were allowed the opportunity to present documentary evidence and testimony before the ALJ. The ALJ's decision is thorough, supported by the preponderance of the evidence in the record and correct as a matter of law. Therefore, this Panel does not find that the ALJ erred in his decision and will not overturn it on exceptions.

Having considered the parties' arguments, the transcript of the hearing before OAH, the documentary evidence contained in the record, and the ALJ's Recommended Decision, it is this 3rd day of January 2018 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 Recommended Decision and 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 B
Maryland Home Improvement
Commission

**IN THE MATTER OF THE CLAIM
OF CLARA BRISCOE,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF BRENNEN
CALLOWAY, T/A GREEN ENERGY,
LLC,
RESPONDENT**

*** BEFORE DOUGLAS E. KOTEEN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No. DLR-HIC-02-16-30807
* MHIC No. 16 (05) 1182
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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 August 4, 2016, Clara Briscoe (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,000.00 in alleged actual losses suffered as a result of a home improvement contract with Brennen Calloway, trading as Green Energy, LLC (Respondent).

I held a hearing on April 5, 2017 at the Largo Government Center, 9201 Basil Court, Largo, Maryland 20774. The Claimant was present and represented herself. The Respondent was also present and represented himself. Hope Sachs, Assistant Attorney General, Department

of Labor, Licensing and Regulation (Department), represented the Fund. Md. Code Ann., Bus. Reg. §§ 8-312(h), 8-407(a) (2015).¹

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. 2016); 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 the loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf (CL Ex.):

- CL Ex. 1. Handwritten notes, undated;
- CL Ex. 2. Letter from Carolina Rodrigues, Personal Banker III, SunTrust Bank to: To Whom It May Concern, undated, with attached Check No. 2035, dated February 23, 2016, and Transaction History, dated February 23, 2016;
- CL Ex. 3. Atlantic Financial, Inc. (AFI) Notice of Action Taken, Statement of Credit Denial, Termination or Change, dated February 23, 2016;
- CL Ex. 4. Letter from Respondent to Claimant, dated June 27, 2016;
- CL Ex. 5. Handwritten notes on Respondent form, undated;
- CL Ex. 6. Letter from Respondent to David R. Finneran, Executive Director, MHIC, dated April 18, 2016; with attached Certificate of Liability Insurance, dated November 24, 2015; Respondent Contract with Claimant, dated February 23, 2016; and Respondent Notice of Cancellation, dated February 23, 2016; and
- CL Ex. 7. Letter from Claimant to: To Whom It May Concern, dated July 28, 2016.

I admitted the following exhibits on the Respondent's behalf (Resp. Ex.):

- Resp. Ex. 1. Gmail Notification to Respondent, dated March 2, 2016;
- Resp. Ex. 2. Equity Mortgage Lending approval notice, dated February 24, 2016;

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

- Resp. Ex. 3. Patriot National Mortgage Corporation (PNMC) Conditional Approval, dated February 24, 2016;
- Resp. Ex. 4. Respondent Contract with Claimant, dated February 23, 2016; and Respondent Notice of Cancellation, dated February 23, 2016; and
- Resp. Ex. 5. Handwritten notes on Respondent form, undated;

I admitted the following exhibits on behalf of the Fund (GF Ex.):

- GF Ex. 1. Memorandum from OAH to Legal Services, dated November 21, 2016; with attached Notice of Hearing, dated November 17, 2016 for April 5, 2017 hearing; MHIC Hearing Order, dated September 27, 2016; and Certified Mail envelope, postmarked November 17, 2016 and returned November 21, 2016;
- GF Ex. 2. Memorandum from OAH to Legal Services, dated November 21, 2016; with attached Notice of Hearing, dated November 17, 2016 for April 5, 2017 hearing; MHIC Hearing Order, dated September 27, 2016; and Regular U.S. Mail envelope, postmarked November 17, 2016 and returned November 21, 2016;
- GF Ex. 3. OAH Memorandum to Legal Services, dated December 19, 2016; with attached Notice of Hearing, dated November 21, 2016 for April 5, 2017 hearing; Copy of Certified Mail envelope, postmarked November 21, 2016 and returned December 16, 2016; and unsigned Green Card, undated;
- GF Ex. 4. MHIC I.D. Registration; Occupational/Professional License History; and Change Code Screen, dated April 4, 2017; and
- GF Ex. 5. Letter from Kevin Niebuhr, Investigator, MHIC, to Respondent, dated August 15, 2016; with attached Home Improvement Claim Form from Claimant, filed August 4, 2016.

Testimony

The Claimant testified during her case-in-chief and on rebuttal. The Claimant also presented the testimony of Sherdona Fryer on rebuttal. The Respondent testified on his own behalf. 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 since July 11, 2012 under MHIC registration number 105038.
2. On February 23, 2016, the Claimant and the Respondent entered into a contract at the Claimant's home, calling for the Respondent to perform home improvement work at the Claimant's residence in Temple Hills, Maryland. The contract called for the Respondent to

furnish and install custom-made thermal vinyl replacement doors, including two back French doors with blinds, one front entry door, two front sidelight windows, and one front storm door. The contract also called for the Respondent to remove and haul away existing doors and/or windows. (CL Ex. 6).

3. The total contract price was \$17,728.00 and called for the Claimant to pay a \$4,000.00 deposit. This left an outstanding balance of \$13,728.00. The contract did not include approximate start and completion dates. (CL Ex. 6).

4. The contract provided that the Claimant could cancel the transaction any time prior to midnight of the third business day after the date of the transaction (rescission period). The contract also included a cancellation provision as follows:

Cancellation: In the event that the Purchaser cancels this contract at any time following expiration of the rescission period, and any materials ordered as agreed, it shall be considered a breach and the Purchaser agrees to pay GE 25% of the contract price as liquidated damages, and not as a penalty.

(CL Ex. 6).

5. The contract also included a Notice of Cancellation (Notice), requiring the Purchaser to deliver a signed and dated copy of the cancellation notice or any other written notice to Green Energy at 8181 Professional Place, Landover, Maryland 20785, no later than midnight February 26, 2016. The Claimant signed a copy of the Notice on February 23, 2016 indicating review of the Notice. (CL Ex. 6).

6. The Claimant paid the Respondent \$4,000.00 on February 23, 2016 by check no. 2035 as a deposit for work to be performed under the contract. (CL Ex. 2).

7. After the parties executed the contract, the Respondent told the Claimant he had to go to his car to obtain copies of the contract and Notice for the Claimant. Instead, the Respondent left the Claimant's home on February 23, 2016 without providing the Claimant with

copies of the contract or Notice. The Respondent immediately went to the Claimant's bank, SunTrust Bank, and cashed the \$4,000.00 check on February 23, 2016.

8. After realizing that the Respondent had left her home without furnishing a copy of the contract and Notice, the Claimant promptly went to SunTrust Bank on February 23, 2016 for the purpose of stopping payment on the check. The Claimant could not stop payment on the check, however, because by time she arrived at the bank, the Respondent had already cashed the check. (CL Ex. 2).

9. Later on February 23, 2016, the Claimant spoke with the Respondent and his assistant by telephone. The Claimant informed the Respondent that he had failed to give her a copy of the contract and that she desired to cancel the contract. The assistant advised the Claimant that financing for the project had been approved for 120 months at an interest rate of 15%. The Claimant told the assistant she was not in agreement with the financing rate, that she had not been given a copy of the contract or Notice, and that she desired to cancel the contract. (CL Ex. 7). Neither the Respondent nor the assistant told the Claimant anything about the cancellation procedures at that time.

10. The Respondent returned to the Claimant's home on February 24, 2016. The Claimant's daughter was present at the Claimant's home at that time. The Claimant requested copies of the contract and Notice and again stated her intent to cancel the contract. The Respondent refused to furnish the Claimant with copies of the contract and Notice and rejected the Claimant's request to cancel the contract. The Respondent told the Claimant she should obtain financing for the contract from her bank if she was not satisfied with other financing rates. The Respondent did not tell the Claimant anything about the cancellation procedures at that time.

11. The Claimant telephoned the Respondent on February 26, 2016 and requested a refund of her deposit. The Respondent refused to refund the Claimant's money.

12. The Respondent sent the Claimant a letter on June 27, 2016 advising that he would still like to perform the work under the contract and did not wish to keep the Claimant's deposit without doing the work. He also advised the Claimant that she should come alone to any future meeting. (CL Ex. 4). The Claimant did not agree to have the Respondent perform any work under the contract.

13. The Respondent performed no work under the contract. He also did not purchase any materials or incur other expenses under the contract.

14. The Respondent never provided the Claimant with a copy of the contract or the Notice. The Claimant only received a copy of the contract and Notice when the MHIC sent her a copy several months later.

15. The Respondent has never refunded the Claimant's \$4,000.00 deposit.

16. On August 4, 2016, the Claimant filed a claim with the MHIC, seeking reimbursement of her \$4,000.00 deposit from the Fund.

DISCUSSION

The Claimant has the burden of proving the validity of her Claim by a preponderance of the evidence. 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 (3rd 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"). 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 the Claimant has proven eligibility for compensation from the Fund.

The evidence is undisputed that the Claimant and the Respondent entered into a home improvement contract on February 23, 2016 for the Respondent to install several doors and sidelight windows at the Claimant’s residence in Temple Hills, Maryland. The total contract price for the home improvement work was \$17,728.00. The Claimant testified that she believed the contract price was \$13,999.00. To support this claim, the Claimant relies on handwritten notes she submitted into evidence which include a notation of \$13,999.00. (CL Ex. 1). However that same document also includes several other handwritten dollar amounts. Moreover, another handwritten document offered into evidence by the Claimant includes still other dollar amounts. (CL Ex. 5).² These handwritten notes include many different dollar amounts, are undated and unsigned, and appear to reflect preliminary negotiations between the parties regarding possible work to be performed and potential contract prices. Both the Claimant and the Respondent also submitted into evidence a copy of the home improvement contract that was signed by both the Claimant and the Respondent, and was dated February 23, 2016. This contract clearly sets forth a total contract price of \$17,728.00. It also identifies a deposit amount of \$4,000.00, with a balance due of \$13,728.00. (CL Ex. 6; Resp. Ex. 4).

The Claimant acknowledges that she signed the contract, but notes that the contract price does not appear on the pages that contain her signature. However, the Claimant was responsible for reviewing the contract before she signed it and she is subject to the contract price set forth in that contract. The fully-executed and dated contract provides a valid representation of the contract price of \$17,728.00. (CL Ex. 6; Resp. Ex. 4).

² The Respondent also offered into evidence copies of the same handwritten notes. (Resp. Ex. 5).

The Claimant contends that she paid the Respondent a \$4,000.00 deposit on February 23, 2016 under the contract. She also asserts that she promptly notified the Respondent of her desire to rescind the contract and requested a full refund of her deposit. She contends that the Claimant has not performed any work under the contract, but has still refused to refund her deposit. She contends that she also attempted to stop payment on the check consistent with her intent to cancel the contract, but by the time she contacted the bank regarding her desire to stop payment, the Respondent had already cashed the deposit check. She indicates that she became concerned by the Respondent's actions because he left her home abruptly without providing her with copies of the contract and the Notice. She contends that she told both the Respondent and his assistant, in a timely manner, of her intent to cancel the contract, but that the Respondent refused to accept her efforts to cancel the contract and did not tell her she must follow the cancellation procedures. She contends that the Respondent never provided her with copies of the contract and Notice despite her numerous requests, that he performed no work under the contract, and that he refused to refund the \$4,000.00 deposit.

The Respondent contends that he properly withheld the Claimant's \$4,000.00 deposit because the Claimant failed to cancel the contract in writing within three days of executing the contract, as required by the terms of the contract and Notice. The Respondent contends that under the terms of the contract, he was entitled to charge the Claimant 25% of the contract price as liquidated damages based on her failure to cancel the contract in writing before expiration of the three-day rescission period. The Respondent also states that he subsequently offered to perform work under the contract, but the Claimant refused.

The Claimant testified that the Respondent failed to give her a copy of the contract and the Notice after she signed those documents at her home on February 23, 2016. The Claimant stated that the Respondent told her he was going out to get her a copy of the contract and Notice,

but that he left her home and never provided her with any copies. She testified that she did not receive a copy of the contract and Notice until the MHIC sent her copies of these documents several months later. She claimed that she was unable to comply with the terms of the cancellation notice, requiring submission of written notice to the Respondent of her intent to cancel the contract within three days of executing the contract, because the Respondent failed to provide her with copies of the contract and Notice setting forth the cancellation procedures.

The Claimant explained that although she did not cancel the contract in writing, she told the Respondent of her intention to cancel the contract on at least two separate occasions within the rescission period. Neither the Respondent nor his assistant reminded her that she must exercise her right to rescind in writing. The Claimant testified that she spoke with the Respondent by telephone on February 23, 2016 and again when he returned to her home on February 24, 2016. The Claimant testified that during these conversations, she told the Respondent that she intended to cancel the contract because he failed to provide her with a copy of the contract and Notice, the contract price was too expensive, and the financing rate was too high. She also requested copies of the contract and Notice and requested a refund of her deposit. She stated that the Respondent rejected her clear efforts to cancel the contract, failed to provide her with copies of the contract and Notice, and refused to refund her deposit.

The Claimant also submitted documentation at the hearing that she provided to the MHIC indicating that the Respondent's assistant telephoned her on the same day she signed the contract – February 23, 2016 – to advise that she had been approved for financing for the project. In that document, the Claimant stated that she told the assistant she was cancelling the contract because the Respondent never provided her with a copy of the contract or the Notice and she did not agree with the interest rate for financing. (CL Ex. 7).

The Respondent testified inconsistently that the Claimant never expressed to him a desire to cancel the contract, or that her efforts to do so occurred after the rescission period. The letter he wrote to the MHIC claimed that the Claimant's attempts to cancel the contract occurred after the rescission period and he also questioned the Claimant's reasons for wanting to cancel. (CL Ex. 6).

I found the Claimant's testimony persuasive regarding her repeated efforts to cancel the contract in a timely manner and concerning her claim that the Respondent failed to provide her with copies of the contract and Notice. The Claimant's testimony was detailed and consistent with other documents and testimony in the record. The Claimant submitted a letter from her banker at SunTrust Bank (SunTrust or Bank). In that letter, Carolina Rodrigues, Personal Banker III, confirmed the Claimant's testimony that she attempted to stop payment on the deposit check on February 23, 2016 because the Respondent had failed to furnish her with a copy of the contract and the Notice. (CL Ex. 2). The Bank also provided the Claimant with a copy of the \$4,000.00 check that was cashed by the Respondent on February 23, 2016, which was attached to the SunTrust letter. (CL Ex. 2). Furthermore, the written statement the Claimant provided to the MHIC was consistent with the Claimant's testimony that the Respondent failed to provide her with copies of the contract and Notice, and that she notified the Respondent and his assistant of her intention to cancel the contract in a timely manner. (CL Ex. 7).

The Claimant's daughter, Sherdona Fryer (Fryer), also testified at the hearing and corroborated the Claimant's testimony. Fryer acknowledged that she was not present on February 23, 2016 when the Claimant and Respondent executed the contract. She explained, however, that she was present at the Claimant's home on February 24, 2016 when the Respondent returned to the Claimant's residence. Fryer stated that she went to the Claimant's home that day after leaving a doctor's appointment and that the Respondent arrived while she

was there. Fryer stated that the Claimant told the Respondent in her presence that she (the Claimant) needed a copy of the contract because the Respondent took her check and just left her home. Fryer stated further that the Claimant told the Respondent in Fryer's presence that she (the Claimant) was cancelling the contract because the interest rate for financing was too high. Fryer testified that the Respondent refused to provide the Claimant with a copy of the contract and ignored the Claimant's repeated efforts to cancel. Fryer stated that the Respondent was very aggressive, demanding, and unprofessional, and continuously tried to negotiate with the Claimant over the financing, despite the Claimant's repeated efforts to cancel the contract.

The Respondent claimed that he did furnish the Claimant with a copy of the contract and the Notice. He testified that he furnished these documents to the Claimant in this case because he gives "everyone" a copy of the contract, and because the Notice contains preprinted language stating that the customer's signature on the document indicates her receipt of the Notice. I find these explanations to be inadequate and I find insufficient evidence in this record to demonstrate that the Respondent actually furnished the Claimant with copies of the contract and Notice. Moreover, the Respondent failed to provide credible testimony as to when or how he provided the Claimant with copies of the contract or Notice. As the contract was signed at the Claimant's home, the Respondent failed to explain how he could have created and furnished copies of these documents while he was still at the Claimant's home. Nor did the Respondent testify that he provided the documents to the Claimant at a later time or by mail. I conclude that the Claimant's detailed testimony regarding the Respondent's failure to furnish her with copies of the contract documents, supported by the SunTrust letter and Fryer's corroborating testimony, is more persuasive and credible than the Respondent's general claim that he provided her with the copies in this case. Moreover, the Respondent's arguments regarding the reasons for the Claimant's desire to cancel the contract are not material to my determination.

Because I have concluded that the Respondent failed to furnish the Claimant with copies of the contract and Notice, I also conclude that the Respondent failed to provide the Claimant with adequate notice of the procedures for cancelling the contract, i.e., that the intent to cancel the contract be in writing and delivered within three days of executing the contract.

Furthermore, the Claimant's multiple efforts to cancel the contract by stating this to both the Respondent and his assistant provided the Respondent with sufficient notice of the Claimant's intent to cancel. Moreover, the Respondent's failure to furnish the Claimant with copies of the contract and Notice was essentially a breach of the contract. Contrary to the Respondent's argument, I conclude that the Claimant did cancel the contract within three days of its execution. As the Claimant rescinded the contract within three days, and the Respondent performed no work under the contract, the Claimant suffered an actual loss when the Respondent failed to return her deposit.

The Respondent claimed that he did not meet with the Claimant on February 24, 2016, but instead met with her on March 2, 2016, after the rescission period had expired. He offered an email document into evidence which he claimed supported his contention that the meeting occurred on March 2, 2016. (Resp. Ex. 1). Although the document does make reference to a possible meeting on March 2, 2016, it fails to establish that the Respondent actually met with the Claimant on that date, and it also fails to demonstrate that he did not meet with the Claimant on February 24, 2016, as she contends. Moreover, the Claimant's evidence established that she notified the Respondent and/or his assistant of her intent to cancel on both February 23 and 24, 2016.

Even if the Claimant had not notified the Respondent within the three-day rescission period of her intent to cancel the contract, the contract clause on which the Respondent relies

fails to support his claim that he was permitted to retain 25% of the contract price as liquidated damages. The contract clause regarding cancellation provides as follows:

Cancellation: In the event that the Purchaser cancels this contract at any time following expiration of the rescission period, and any materials ordered as agreed, it shall be considered a breach and the Purchaser agrees to pay GE 25% of the contract price as liquidated damages, and not as a penalty.

(CL Ex. 6).

This clause provides that the Respondent is entitled to retain 25% of the contract price as liquidated damages only if the purchaser cancels the contract after expiration of the rescission period *and* after the Respondent orders any materials under the contract. The Respondent presented no evidence that he ordered any materials under the contract or that he incurred any other expenses under the contract. Therefore, even if the Claimant had cancelled the contract after the three-day rescission period, the Respondent would still be precluded from charging the Claimant a 25% cancellation fee because he has failed to establish on this record that he ordered any materials or incurred other expenses under the contract. For this additional reason, I conclude that the Claimant suffered an actual loss when the Respondent retained the Claimant's deposit, despite performing no work under the contract.

The Respondent also argued that he subsequently offered to perform work under the contract after retaining the Claimant's deposit, but the Claimant refused to agree. The record includes a letter from the Respondent to the Claimant, dated June 27, 2016, in which the Respondent offered to perform work under the contract because he did "not wish to keep [the Claimant's] deposit without doing the work." (CL Ex. 4). The Respondent also claimed that he offered to reduce the contract price by several thousand dollars, but that the Claimant refused this offer. In accordance with section 8-405(d) of the Business Regulation article, I do not find that the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). I conclude that the Claimant reasonably refused to permit

the Respondent to perform work under the contract after she notified the Respondent of her desire to cancel. It was reasonable for the Claimant to decide she did not trust the Respondent and did not want him to perform any work under the contract because she was dismayed by his behavior in abruptly leaving her home without furnishing her with copies of the contract and Notice at that time or thereafter, failing to accept her repeated efforts to cancel the contract, failing to refund her deposit, refusing to permit the Claimant to bring her daughter to any future meetings, and generally by his unprofessional demeanor.

Accordingly, for the reasons addressed above, I conclude that the Claimant suffered an actual loss based on the Respondent's failure to refund the deposit after performing no work under the contract and after the Claimant's multiple valid attempts to cancel the contract. Md. Code Ann., Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(2). Therefore, I find the Claimant eligible for compensation from the Fund.

I will now consider the amount of the award to which the Claimant is entitled. Unless a particular claim requires a unique measurement, the MHIC shall determine a claimant's actual loss using one of the formulas set forth in COMAR 09.08.03.03B(3), which 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.

In this case, the formula contained in COMAR 09.08.03.03B(3)(a) is most similar to the present circumstances, but not identical, because while the Respondent performed no work under the contract, the Claimant properly cancelled the home improvement contract before the Respondent had an opportunity to abandon it. The formulas set forth in COMAR 09.08.03.03B(3)(b) and COMAR 09.08.03.03B(3)(c) are inapplicable because in this case the Respondent performed no work under the contract.

The Fund argued that the credible evidence presented by the Claimant established an actual loss as a result of the Respondent's acts or omissions as a home improvement contractor. The Fund contends that the Claimant is entitled to an award of \$4,000.00 from the Fund to reimburse her for the deposit she paid the Respondent because the Respondent performed no work under the contract.

The Claimant entered into a home improvement contract with the Respondent on February 23, 2016 and paid the Respondent a deposit of \$4,000.00 under the contract on the same day. The Respondent performed no work under the contract after the Claimant properly cancelled the contract, but he refused to refund the Claimant's deposit. For the reasons addressed above, I conclude that the Claimant properly notified the Respondent in a timely manner that she was cancelling the contract. As the Respondent performed no work under the contract, the Claimant is entitled to a full refund of the deposit she paid the Respondent. This result is required by the provision set forth at COMAR 09.08.03.03B(3)(a). Where the Respondent has performed no work under the contract, the Claimant's actual loss is the amount she paid to the Respondent under the contract, which is \$4,000.00.

Even if I were to determine that this formula does not strictly apply because the Respondent did not technically abandon the contract, and that this Fund claim requires a unique measurement under COMAR 09.08.03.03B(3), I would still find the Claimant entitled to an award of \$4,000.00 from the Fund. Her actual loss is properly calculated as the amount she paid to the Respondent under the circumstances of this case where the Respondent performed no work under the contract. Therefore, under either theory, I recommend that the Fund award the Claimant \$4,000.00 for the actual loss she sustained.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,000.00 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 \$4,000.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20; and

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

June 23, 2017
Date Decision Issued

Signature on File

Douglas E. Koteen
Administrative Law Judge

DEK/da
168500

PROPOSED ORDER

WHEREFORE, this 31st day of July, 2017, 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