

<b>IN THE MATTER OF THE CLAIM</b>	<b>* BEFORE ROBERT F. BARRY,</b>
<b>OF DAVID T. MOORE,</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>AGAINST THE MARYLAND HOME</b>	<b>* OF THE MARYLAND OFFICE</b>
<b>IMPROVEMENT GUARANTY FUND</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>FOR THE ALLEGED VIOLATIONS</b>	<b>* OAH NO.: DLR-HIC-02-13-08792</b>
<b>OF CHRISTOPHER J. HANES,</b>	<b>* MHIC NO.: 09 (90) 919</b>
<b>MHIC LIC. NO.: 01-30647</b>	<b>*</b>
<b>(INDIVIDUAL),</b>	<b>*</b>
<b>T/A ABSTRACT CONTRACTING,</b>	<b>*</b>
<b>INC.,</b>	<b>*</b>
<b>MHIC LIC. NO.: 05-30646</b>	<b>*</b>
<b>(CORPORATE),</b>	<b>*</b>
<b>RESPONDENT</b>	
<b>* * * * *</b>	<b>* * * * *</b>

**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSION OF LAW  
ORDER

**STATEMENT OF THE CASE**

On September 26, 2012, David T. Moore (Claimant) filed a claim with the Maryland Home Improvement Commission (Commission or MHIC) Guaranty Fund (Fund) for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract with Christopher J. Hanes, t/a Abstract Contracting, Inc. (Respondent), a licensed contractor. On

January 25, 2013, the Commission issued a Hearing Order; on February 4, 2013, the Commission transmitted the case to the Office of Administrative Hearings (OAH).

On August 9, 2013 and November 22, 2013, I held a hearing at the Office of the Comptroller, Westfield South Building, Suite 408, 2730 University Boulevard - West, Wheaton, Maryland 20902. On May 14, 2014, I held a hearing at the OAH – Kensington, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895.<sup>1</sup> Md. Code Ann., Bus. Reg. §§ 8-312(a) (Supp. 2013) and 8-407(a) and (c)(2)(i) (2010). Attorney David G. Winer, Winer & Winer, LLC, represented the Claimant. The Respondent represented himself. Eric London, 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 Commission, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02; COMAR 28.02.01.

### **ISSUES**

1. Is the Claimant's claim against the Fund barred by the applicable three-year statute of limitations?
2. Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions, and, if so, what is the amount of that loss?

### **SUMMARY OF EVIDENCE**

#### **Exhibits**

The Claimant submitted forty exhibits, which, except as noted, I admitted into evidence:

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<sup>1</sup> Other hearing dates were postponed and rescheduled for various reasons. The Respondent was sick on November 7, 2013, OAH hearings were postponed due to snow on January 7, 2014, and the Comptroller's Office was unavailable due to a broken water pipe on March 27, 2014.

- CLAIM #1 - Letters between the Claimant's attorney and the MHIC, February 18, 2009; February 20, 2009; March 12, 2009; March 13, 2009; and September 21, 2012
- CLAIM #2 - Excerpt from Section 8-405 of the Business Regulation Article
- CLAIM #3 - Definition of "seek" from the Free Merriam-Webster Dictionary
- CLAIM #4 - *Brzowski v. Maryland Home Improvement Commission*, 114 Md. App. 615 (1997)
- CLAIM #5 - Home Improvement Contract Proposal, March 18, 2008, with Job Description
- CLAIM #6 - Photographs of the Claimant's house, before and after renovations
- CLAIM #7 - Drawings for renovations of the Claimant's house
- CLAIM #8 - Roofing Proposal, Roof Masters, August 8, 2013, with thumb drive with photographs of the Claimant's roof
- CLAIM #9 - Renovation Project Inspection Report, Trademaster Home Inspection Report, Joseph Sagona, President, with nineteen tabbed sections
- CLAIM #10 - General Structural Approval for bolt for steel beam
- CLAIM #11 - Photograph of bolt for steel beam
- CLAIM #12 - Photograph of bolt for steel beam
- CLAIM #13 - Invoice, October 24, 2008
- CLAIM #14 - Quick Biography of Devin Nasvaderani, Marvel Homes
- CLAIM #15 - Renovation Estimate, Marvel Homes, April 15, 2010 and Update, April 14, 2011
- CLAIM #16 - Summary of payments for work performed by Custom Management Service after the Respondent was no longer working on the Claimant's house
- CLAIM #17 - General Structural Approval for bolt for steel beam
- CLAIM #18 - Contracts between the Claimant and Custom Management Service, with invoices and records of payments
- CLAIM #19 - Invoices: February 3, 2008; February 7, 2008; April 3, 2008; April 17, 2008; May 2, 2008 - \$40,000.00; May 2, 2008 - \$1,045.00; May 8, 2008; May 13, 2008; June 16, 2008; July 8, 2008 - \$3,120.00 or \$4,310.00; July 8, 2008 - \$860.00;

July 8, 2008 - \$3,160.00; July 10, 2008 - \$45,000.00; July 15, 2008; August 11, 2008; October 8, 2008; and October 24, 2008;

Receipts: February 3, 2008; February 23, 2008; April 3, 2008

Canceled checks: February 3, 2008; February 21, 2008; March 24, 2008; April 3, 2008; April 18, 2008; May 14, 2008; May 22, 2008; June 12, 2008; July 10, 2008 - \$45,000.00; July 10, 2008 - \$8,331.00; August 6, 2008; August 25, 2008

CLAIM #20 - Summary of payments for work performed by the Respondent

CLAIM #21 - Response of the Respondent to the Claimant, with e-mail from the Claimant to his attorney

CLAIM #22 - Photograph of walls

CLAIM #23 - Photograph of walls and ceiling

CLAIM #24 - Photograph of side and back of house

CLAIM #25 - Home Improvement Contract Proposal, March 18, 2008, with Job Description

CLAIM #26 - Application for Residential Building Permit and Building Permit

CLAIM #27 - State Department of Assessments and Taxation information for Abstract Contracting, Inc.

CLAIM #28 - MHIC licensing history for the Respondent

CLAIM #29 - Affidavit of David Wallace, P.E., April 15, 2010, with General Structural Approval for bolt for steel beam

CLAIM #30 - Affidavit of Jeff Croco, December 3, 2012, with General Structural Approval for bolt for steel beam

CLAIM #31 - Receipts: February 3, 2008; February 23, 2008; and April 3, 2008

CLAIM #32 - Orders, Better Business Bureau of Greater Maryland, May 22, 2012 and June 30, 2012

CLAIM #33 - Case Information, District Court of Maryland for Montgomery County, Case No.: 060100290692004

CLAIM #34 - Letter, October 20, 2008, from the Respondent to the Claimant

CLAIM #35 - Letter, October 3, 2008, from the Claimant's attorney to the Respondent

CLAIM #36 - Invoice, October 8, 2008

CLAIM #37 - Invoice, October 24, 2008, with Response of the Respondent to the Claimant, with e-mail from the Claimant to his attorney

CLAIM #38 - Invoice, July 8, 2008

CLAIM #39 - Record of Better Business Bureau of Greater Maryland, Case No. 1010

CLAIM #40 - Invoices: February 3, 2008; February 7, 2008; April 3, 2008; April 17, 2008; May 2, 2008 - \$40,000.00; May 2, 2008 - \$1,045.00; May 8, 2008; May 13, 2008; June 16, 2008; July 8, 2008 - \$3,120.00 or \$4,310.00; July 8, 2008 - \$860.00; July 8, 2008 - \$3,160.00; July 10, 2008 - \$45,000.00; July 15, 2008; August 11, 2008; October 8, 2008; and October 24, 2008;

Receipts: February 3, 2008; February 23, 2008; April 3, 2008

Canceled checks: February 3, 2008; February 21, 2008; March 24, 2008; April 3, 2008; April 18, 2008; May 14, 2008; May 22, 2008; June 12, 2008; July 10, 2008 - \$45,000.00; July 10, 2008 - \$8,331.00; August 6, 2008; August 25, 2008

The Respondent submitted the following exhibits, which, except as noted, I admitted into evidence:

- RESP #1 - (not submitted)
- RESP #2 - Photograph of stairwell with the Respondent holding a tape measure
- RESP #3 - Two DVDs of inspection performed by Brian Koepf, January 20, 2011
- RESP #4 - CD-RW of photographs taken during home improvement project
- RESP #5 - Biography of Brian Koepf, Gatekeeper Inspections, LLC
- RESP #6 - Annotations/Comments by Brain Koepf
- RESP #7 - Brian Koepf's Comments on Sagona Report
- RESP #8 - Contracts between the Claimant and Custom Management Service, June 15, 2009, with the Respondent's comments
- RESP #9 - Estimate, Brady Fabrications, Inc.

- RESP #10 - Renovation Estimate, April 15, 2010, Marvel Homes, with the Respondent's comments
- RESP #11 - Letter, October 16, 2008, from the Respondent to the Claimant
- RESP #12 - Excerpt from a brief filed in arbitration proceeding between the Claimant and the Respondent, concerning an allegedly forged certification from David Wallace, P.E.
- RESP #13 - Letter, March 13, 2008, from David Wallace, P.E.
- RESP #14 - E-mail from the Claimant to the Respondent, September 30, 2008 - This week's to do list
- RESP #15 - Communication between the Respondent and the Claimant: November 24, 2007 through October 5, 2008
- RESP #16 - Binder of [Respondent's] Exhibits for arbitration hearing, with sixty-two tabbed exhibits
- RESP #17 - (Not admitted and returned to the Respondent) Claimant's bank records
- RESP #18 - Voice-mail messages from the Claimant to the Respondent (not an actual exhibit; message machine messages played on the record)
- RESP #19 - Mutual Non-Disclosure Agreement
- RESP #20 - Temporary Peace Order, District Court of Maryland for Montgomery County
- RESP #21 - Case Information, District Court of Maryland for Montgomery County, Case No.: 3D00216009
- RESP #22 - (not admitted) E-mail, September 16, 2008, from the Claimant to the Respondent

The Fund submitted the following exhibits, which, except as noted, I admitted into evidence:

- FUND #1 - Letter, February 12, 2009, from Kevin Niebuhr, Investigator, MHIC, to the Claimant
- FUND #2 - Complaint, received by the MHIC on November 21, 2008, with the Claimant's statement
- FUND #3 - Notice of Hearing for August 9, 2013

- FUND #4 - Letter, July 22, 2013, from the Fund's attorney to the Respondent
- FUND #5 - Hearing Order, January 25, 2013
- FUND #6 - Respondent's Licensing History, June 26, 2013
- FUND #7 - Home Improvement Fund Claim, received by the MHIC on September 26, 2012
- FUND #8 - Letter, October 4, 2012, from the MHIC to the Respondent
- FUND #9 - Hanes Repair List, Devin Nasvaderani, t/a Marvel Home Improvement
- FUND #10 - (not admitted) Estimate, January 21, 2009, David Ladson
- FUND #11 - Answer and Counterclaim, Better Business Bureau of Greater Maryland, Case No.: 1010

Additional Filings

The Claimant and the Fund submitted additional documents on the statute of limitations issue.

The Claimant presented a Memorandum and Affidavit, with Exhibits A through G, most of which were already in the record. The additional documents were an Order of the Circuit Court for Montgomery County (part of Exhibit C); the Claimant's Affidavit (Exhibit D); FAQs from the Commission's website (Exhibit E); and Summary of Committee Report and Bill Analysis, Senate Bill 507 (Exhibit F).

The Fund presented three documents: an e-mail from Joel Jacobson to Steve Smithson, March 3, 2011; Commission's Memorandum of Law, Case No. 317038-V, Circuit Court for Montgomery County; and Commission's Memorandum of Law, Case No. 10-C-06-000684-AA, Circuit Court for Frederick County.

The Claimant also presented an e-mail in response to the Fund's documents.

### Testimony

The Claimant testified on his own behalf. He also presented testimony from the following witnesses:

Howard Neil Rittenberg, Owner and President, Masters Group Inc., t/a Roof Masters, MHIC License #50663, who testified as an expert witness in roofing;

Joseph Sagona, Trademaster Home Inspection Service, Inc., who testified as an expert witness in home inspection.

Devin Nasvaderani, general contractor, Marvel Homes, MHIC License #127638, who testified as an expert in general contracting, estimating, and pricing.

Frank Miles, general contractor, Custom Management Service, MHIC License #44995, who testified as an expert in general contracting, estimating, and pricing.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

### **FINDINGS OF FACT**

I find the following facts, which are limited to the statute of limitations issue, by a preponderance of the evidence:

1. The Respondent was licensed by the Commission as a home improvement contractor under registration numbers 01-30647 (individual) and 05-30646 (corporate), operating under the trade name of Abstract Contracting, Inc., at the time he entered into and performed on a home improvement contract with the Claimant. The Respondent's home improvement licenses expired on May 19, 2013. (FUND #6).

2. The Claimant and his wife and daughter reside in a home located at 812 Malcolm Drive, Silver Spring, Maryland 20901.



3. On March 18, 2008, the Claimant and the Respondent entered into a home-improvement contract for the Respondent to perform an extensive renovation to the Claimant's home for \$249,625.00. (CLAIM #5).

4. The contract involved a second-story addition and a partial first-story on the right side of the Claimant's house and a full two-story addition on the left side of the Claimant's house.

5. The contract included a Job Description with eighty-two numbered items. (CLAIM #5).

6. The contract provided for a payment schedule of seventeen installments, beginning upon receipt of a building permit and then upon completion of certain numbered items from the Job Description. (The payment schedule actually totals to \$269,625.00.) (CLAIM #5).

7. The Respondent began to perform work on the home improvement contract on or about April 15, 2008.

8. The Respondent last performed work on the home improvement contract on or about October 27, 2008.

9. The Claimant paid the Respondent, based on canceled checks, at least \$190,796.00. (CLAIM #19 and #20).

10. On November 21, 2008, the Claimant filed a complaint against the Respondent with the Commission. (FUND #1). The Complaint included a statement expressing the Claimant's concerns about the Respondent's performance on the home-improvement contract and the Respondent's business practices and trustworthiness. (FUND #1).

11. The Claimant's home-improvement contract with the Respondent contained an arbitration clause, which the Respondent invoked in February 2009.

12. The Commission ultimately declined to pursue regulatory charges and penalties against the Respondent.

13. On January 28, 2009, Devin Nasvaderani provided the Claimant a repair list for items either worked on or left unfinished by the Respondent. The repair list included an estimate of \$850.00 to repair gutters that were loose and barely attached to the house in some places; an estimate of \$2,100.00 for work on the crawlspace, including a vapor barrier and ventilation; and an estimate of \$1,200.00 for work for attic ventilation. (FUND #9).

14. On February 12, 2009 Kevin Niebuhr, a Commission investigator, wrote a letter to the Claimant concerning his complaint. Mr. Niebuhr advised the Claimant that the three-year statute for limitations was not tolled during the pendency of arbitration. (FUND #1).

15. In or about July 2009, Joseph Sagona of Trademaster Home Inspection Service, Inc., inspected the Respondent's work and issued a report concerning his findings, which he updated in April 2010. Mr. Sagona determined that there were deficiencies in the Respondent's work in nineteen areas, including the library slab, library foundation, crawlspace insulation, crawlspace gravel/vapor barrier, roof and attic, and guttering and flashing. In a letter dated July 31, 2009, Mr. Sagona advised the Claimant that there might be additional latent defects in the Respondent's work. (CLAIM #9).

16. On April 20, 2010, Howard Rittenberg of Roof Masters inspected the roofing system installed by the Respondent. Mr. Rittenberg determined that the roof had been installed improperly and was not functioning as a proper roofing system. Mr. Rittenberg determined that the roofing system had inadequate intake and exhaust ventilation. (CLAIM #8).

17. The arbitration conducted by the Better Business Bureau of Greater Maryland took over three years to conclude, without ever addressing the merits of the subject matter of the arbitration. (CLAIM #32).

18. On September 26, 2012, the Claimant filed his claim against the Fund for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract with the Respondent. (FUND #7).

## DISCUSSION

### Fund Claim

A home 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) (Supp. 2013). An “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 (2010). For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor or employee of the licensed contractor, whether an express agency relationship exists. Md. Code Ann., Bus. Reg. § 8-405(b) (Supp. 2013). Additionally, a claimant shall comply with a written agreement to submit to arbitration before seeking recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(c) (Supp. 2013).

To begin a proceeding to recover from the Fund, a claimant shall submit to the Commission a claim, under oath, that states: (1) the amount claimed based on the actual loss; (2) the facts giving rise to the claim; (3) any other evidence that supports the claim; (4) any other information that the Commission requires. Md. Code Ann., Bus. Reg. § 8-406 (2010).

A claimant has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2010). In the circumstances presented here, the Claimant has the burden to establish that: (1) the Respondent's performance on the home improvement contract was unworkmanlike, inadequate, or incomplete; (2) the Claimant had an actual loss due to the costs of restoration, repair, replacement, or completion of the home improvement contract; and (3) the Claimant did not unreasonably reject the Respondent's good faith efforts to resolve the claim.

#### Statute of Limitations

At the outset of the hearing on August 9, 2013, the Fund moved to dismiss the Claimant's claim against the Fund based on the applicable statute of limitations, which provides that "[a] claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405(g) (Supp. 2013); *see also* COMAR 09.08.03.02G. The Respondent concurred with the Fund's motion; obviously, however, the Claimant did not. By regulation, an administrative law judge hearing a case on behalf of the Commission may not grant a motion to dismiss or any other dispositive motion without the concurrence of all parties. COMAR 09.01.03.05B. Thus, I was obligated to conduct an entire hearing before I could render my proposed decision concerning the Fund's preliminary motion. As explained below, I shall propose that the Commission grant the Fund's motion to dismiss the Claimant's claim against the Fund based on the applicable three-year statute of limitations.

This issue requires some brief factual background. The Respondent began to perform work on the home improvement contract with the Claimant on or about April 15, 2008, and last performed work on the contract on or about October 27, 2008. (The Claimant and the Respondent differ as to whether the Respondent abandoned the contract or the Claimant

unjustifiably refused to make payments due to the Respondent.) On November 21, 2008, the Claimant filed a complaint against the Respondent with the Commission, which could have resulted in the Commission pursuing regulatory charges and penalties against the Respondent. *See Md. Code Ann., Bus. Reg. § 8-311 (2010).* On the complaint, the Claimant noted that his home improvement contract with the Respondent contained an arbitration clause, which the Respondent later invoked. The Commission ultimately declined to pursue regulatory charges and penalties against the Respondent. Between February 12, 2009 and March 13, 2009, the Claimant and his attorney and the Commission exchanged phone calls and letters about the Claimant's complaint, the Commission's decision on pursuing regulatory charges and penalties against the Respondent, the arbitration clause in the home-improvement contract, and the time for filing the Claimant's claim against the Fund.

On February 12, 2009, Kevin Niebuhr, a Commission investigator, wrote a letter to the Claimant concerning his complaint, a potential claim against the Fund, and the effect of a potential arbitration on the filing of such a claim:

A review of your complaint file revealed that no Guaranty Fund claim has been filed. You are advised that the time limitation for filing a claim against the Guaranty Fund is established by law, Business Regulation Article, Section 8-405(g), which states, "a claim shall be brought against the Fund within three (3) years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damages." Enclosed is a Guaranty Fund claim form should you wish to file a claim.

Please be advised that your contract requires all disputes arising out of the contract be submitted to arbitration. Business Regulation Article, Section 8-405(c) states, a claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the fund. Therefore, the Home Improvement Commission will acknowledge receipt of your claim but will not proceed any further until arbitration has been completed.

Should you receive an arbitration award, the award may be paid by the Commission. In order for the Commission to make payment, the arbitration hearing must be contested and the decision must contain an itemized list of actual

damages and the specific basis for awarding these damages. It must also contain the basis for the award i.e. poor workmanship, abandonment of contract, incomplete work, etc. If the arbitrator determines that your claim is invalid, the Commission would be barred from paying your claim by Business Regulation Article, Section 8-408(b)(3)(ii).

Please complete and return the enclosed claim form at the earliest date so it may be filed within the statute time. The Commission is administratively closing your complaint until your claim is received. Should you have any questions, please feel free to contact me.

(FUND #1).

Meanwhile, the Claimant and his attorney were speaking with Helen Johnson, the Commission's Assistant Executive Director, to encourage the Commission to pursue and investigate the Claimant's complaint against the Respondent.

On February 18, 2009, the Claimant's attorney wrote a letter, which referenced Mr. Niebuhr's letter, to Ms. Johnson:

When we spoke last Friday, February 13<sup>th</sup>, you were going [to] personally have a look at the above file and possibly discuss it with several investigators. When we spoke prior to that on January 22<sup>nd</sup>, you specifically advised that, under Md. Code Ann., Bus. Reg. 8-405(c), a contract arbitration clause had no effect whatsoever on a Complaint and only stayed a Guaranty Fund claim (which is precisely how the provision reads). Despite these assurances, it appears from an intervening letter . . . written on February 12<sup>th</sup> by Investigator Niebuhr (copy attached) taking the position that the above-referenced homeowner's Complaint would not be investigated despite the fact that the homeowner has made no Guaranty Fund claim. It would be appreciated if you would confer with Investigator Niebuhr on this matter and as promptly as possible have an Investigator visit the homeowner to commence an on-site investigation (and, if within budget, have a State expert visit the homeowner's residence as well). Please contact me after you have had a chance to review this matter internally. . . .

(CLAIM #1).

On February 20, 2009, the Claimant's attorney wrote another letter to Ms. Johnson, referencing a letter of that same date from Ms. Johnson (Ms. Johnson's purported letter was not submitted for the record):

Thank you for your clarification letter of today regarding the processing of the above Complaint. While your letter appears to be a recission of Mr. Niebuhr's letter of 2/12/09 at least as regards his statement that MHIC would just "acknowledge receipt of your claim but will not proceed any further until arbitration has been completed," since that 2/12/09 letter was copied to [Respondent], we urge you to likewise *reissue a letter to [Respondent] clarifying that the MHIC will in fact be going forward* with an investigation of the subject Complaint.

As an aside, and as we initially spoke about, even if an expert cannot be involved for the State at this time, we urge MHIC to have an experienced investigator visit the homeowner on site at the soonest possible date. . . .

(CLAIM #1).

On March 12, 2009, Ms. Johnson wrote a letter to the Claimant's attorney and to the Respondent's attorney, in which she indicated that the Respondent, by his attorney, pursuant to the home-improvement contract, had made a demand for arbitration. Ms. Johnson also indicated that the Commission would stay its regulatory investigation against the Respondent pending the outcome of the arbitration, and that the Commission would not assign an expert or an investigator to the Claimant's complaint. Ms. Johnson did not mention the Fund. (CLAIM #1).

On March 13, 2009, the Claimant's attorney responded, in pertinent part, to Ms.

Johnson's letter:

I am in receipt of your letter in the above matter dated 3/12/09 and find it disappointing and disingenuous for two (2) reasons. When you spoke to the [Claimant] and I by phone on 1/22/09, you explicitly stated that Bus. Reg. Art. 8-405 does not stay an ordinary homeowner Complaint; it just stays a Guaranty Fund claim (your words, which are apparent under the statute). You even stated that the investigator assigned in this matter was inexperienced and had misjudged the statutory requirements. . . .

The balance of the Claimant's attorney's letter focused on the Commission's refusal to investigate the Claimant's complaint or assign an expert. (CLAIM #1).

The arbitration conducted by the Better Business Bureau of Greater Maryland took over three years to conclude, without ever addressing the merits of the subject matter of the

arbitration. On June 30, 2012, the arbitrator awarded the Claimant attorney's fees and costs against the Respondent for the Respondent's failure to diligently cooperate with the arbitration. (CLAIM #32). The Claimant also filed a civil action against the Respondent, but that proceeding concluded upon the Respondent's suggestion of bankruptcy.

On September 26, 2012, the Claimant filed his claim against the Fund for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract with the Respondent. (FUND #7).

The Fund's position is that the Claimant had to file his claim against the Fund within three years of November 21, 2008, the date on which he filed his complaint against the Respondent with the Commission. (As explained below, I used other dates in early and mid-2009 as alternative dates for beginning the limitations period.) The Fund cited the language of section 8-405(g) that a claim shall be brought against the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage. The Fund also cited the explicit advice provided by Mr. Niebuhr to the Claimant and his attorney to file a timely claim against the Fund even if they were going to participate in arbitration.

The Claimant made three arguments in response to the Fund's motion to dismiss. First, the Claimant argued that the Commission's position, as stated in Mr. Niebuhr's letter, is inconsistent with the language of Section 8-405(c) concerning a claimant's duty to participate in arbitration before seeking recovery from the Fund. The Claimant argued that the language stating that that a claimant shall comply with a written agreement to submit to arbitration before seeking recovery from the Fund meant that the three-year limitation for filing a claim is tolled until the arbitration process is completed. The Claimant cited *Brzowski v. MHIC*, 114 Md. App. 615



(1997) for the principle that a remedial statute such as the one creating for the Fund should be given a liberal construction.

The language of section 8-405(c) provides that a claimant shall comply with an arbitration agreement before seeking recovery from the Fund. The Claimant's interpretation of the statute, that a claim against the Fund cannot be filed or need not be filed while an arbitration is pending, is not unreasonable, but neither is the Fund's interpretation, which is that a claim against the Fund, regardless of the provision concerning an arbitration agreement, still must be filed within the three-year statute of limitations contained in section 8-405(g).

When a statute is ambiguous, an administrative law judge should consider the interpretation of the agency tasked with enforcing the statute. *See Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437 (1997) (the consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute's subject); *Cathey v. Board of Review, Department of Health and Mental Hygiene*, 422 Md. 597, 604 (2011) (an agency's interpretation of its own regulations is entitled to some deference due to the agency's understanding of its intent in promulgating a regulation and its expertise in the subject area.) This latter provision applies to COMAR 09.08.03.02G.

In addition to Mr. Niebuhr's letter, the Fund presented three documents to support its position that Mr. Niebuhr's advice to the Claimant and his attorney reflected the Commission's long-standing interpretation concerning the relationship between the statute of limitations for filing a claim against the Fund and a claimant's duty to comply with a written agreement to submit to arbitration before seeking recovery from the Fund. The documents provided by the Fund offer some limited guidance, primarily by analogy to the Fund's legal position concerning

the relationship between filing a claim against the Fund and pursuing a civil action against a licensed contractor. By statute, notwithstanding a provision that provides that the Fund does not limit the availability of other remedies to a claimant, a claimant may not concurrently submit a claim to recover from the Fund and bring an action in a court of competent jurisdiction against a contractor based on the same facts alleged in the claim. Md. Code Ann., Bus. Reg. §§ 8-402(2) and 8-408(b)(1) (2010). If the claimant brings an action in a court of competent jurisdiction based on the same facts alleged in a pending claim, the Commission shall stay its proceedings on the claim until there is a final judgment and all rights to appeal are exhausted. Md. Code Ann., Bus. Reg. § 8-408(b)(2) (2010). In a legal memorandum presented in another case, the Fund argued that three-year statute of limitations for filing a claim against the Fund is not tolled pending a civil action. The language of section 8-408(b)(2) – the Commission shall stay its proceedings on the claim until there is a final judgment and all rights to appeal are exhausted in the civil action – pretty clearly states that what is stayed in the civil action situation are proceedings on the claim, not the requirement to actually file a claim and to file it within the three-year statute of limitations.

The Fund's position furthers one of the primary purposes for having a statute of limitations, which is to put all potentially liable parties on notice as soon as possible that a claim has been filed against them so that the parties can have a certain degree of repose. *See Poole v. Coakley & Williams Construction, Inc., et al.*, 423 Md. 91, 130-131 (2011); *Pierce v. Johns-Manville Sales Corp.* 296 Md. 656, 665 (1983). In this case, the Fund's position that the time for filing a claim against the Fund is not tolled pending arbitration, would permit a contractor to be aware of the claim and to factor it into his overall legal strategy. This purpose for the statute of limitations is served despite the fact that the Commission will stay the claim against the Fund.

The Claimant's theory would merely extend the time for filing a claim against the Fund to an unknown date, which would undermine the purpose of putting a contractor on notice of a claim against the Fund within a reasonable a time period. I find, in light of the applicable statutory language, the overall statutory scheme concerning the Fund, and the historical interpretation given the statutes by the Commission, that the Fund's interpretation concerning the statute of limitations is reasonable and binding upon me as an administrative law judge. Under the Maryland Administrative Procedure Act, an administrative law judge in contested case is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case. Md. Code Ann., State Gov't § 10-214(b) (2009).

Second, the Claimant asserted that he and his attorney had been advised by Helen Johnson, the Commission's Assistant Executive Director, that the Claimant's understanding concerning the three-year statute of limitations was correct. Based upon their communications with the Commission, the Claimant and his attorney apparently decided not file a claim against the Fund while the arbitration was pending because they concluded that the Commission had advised them that the three-year statute of limitations for filing a claim would be tolled pending the arbitration. (The Claimant and his attorney primarily were focused upon getting the Commission to pursue regulatory charges against the Respondent; it is not clear to me that in 2009 that they intended to file a claim against the Fund as their focus was on regulatory charges, arbitration, and a civil action.) My review of the letters between the Claimant's attorney and the Commission, and the Claimant's testimony and affidavit, lead me to conclude that the Commission actually advised the Claimant and his attorney that the three-year statute of limitations would not be tolled pending the arbitration.

At the hearing on August 9, 2013, the Claimant testified that “Ms. Johnson told me, as I understand it, what she was saying, she told me that we had to wait until after the arbitration was over to file the [Fund] claim.” In an affidavit filed with a legal memorandum at the hearing on May 14, 2014, the Claimant stated that “[Ms.] Johnson told us that the investigator [Mr. Niebuhr] was ‘inexperienced and had misguided the statutory requirements’ and upon inquiry about the need to file a guaranty fund claim before arbitration she advised that it was proper to hold off filing a guaranty fund claim until the arbitration concluded.” (Exhibit D to Claimant’s Memorandum).

I find, after considering the Claimant’s testimony on August 9, 2013, which seemed unscripted and genuine, as compared to his statement in the affidavit, that while the Claimant might believe that Ms. Johnson told him to hold off on filing his claim against the Fund, I am not convinced that is what Ms. Johnson actually said. As noted above, neither the Claimant nor the Fund submitted Ms. Johnson’s purported letter of February 20, 2009, which the Claimant’s attorney read as appearing to be a rescission of Mr. Niebuhr’s advice on filing a claim against the Fund within three years even if there is a pending arbitration. Frankly, I do not know what Ms. Johnson advised the Claimant and his attorney about filing a claim against the Fund. The only letter in the record from Ms. Johnson indicates that the Commission was staying its regulatory investigation pending the arbitration; it is silent as to the process for filing a claim against the Fund in light of the arbitration. The clearest evidence in this record of the Commission’s advice to the Claimant concerning the effect of the arbitration on the filing of a claim against the Fund is Mr. Niebuhr’s letter, which explicitly tells the Claimant to file a claim against the Fund within three years even if there is a pending arbitration. I find that the Commission did not mislead the

Claimant or induce him to hold off filing a claim against the Fund until the completion of arbitration.

Third, the Claimant argued that at least some of the items in his claim were within the three-year statute of limitations because he did not discover these specific problems until 2010. The Claimant testified that in January or February 2010, after some historically heavy snow falls, he discovered that his roof was leaking. (CLAIM #22, #23). He also testified that he did not discover that some gutters need to be repaired until they fell off in February 2010. The Claimant further asserted that he did not discover that the roof installed by the Respondent had to be replaced until he was told so by Mr. Rittenberg of Roof Masters in April 2010; or that there were problems with waterproofing of the foundation and crawlspace until he was told of these problems by Devin Nasvaderani of Marvel Home Improvement in February 2011. The Claimant's argument fails both as a factual and a legal matter. First, as to the gutters, Mr. Nasvaderani provided the Claimant a repair list in January 2009, which included an estimate of \$850.00 to repair gutters that were loose and barely attached to the house in some places; an estimate of \$2,100.00 for work on the crawlspace, including a vapor barrier and ventilation; and an estimate of \$1,200.00 for work for attic ventilation. (FUND #9). In or about July 2009, Joseph Sagona of Trademaster Home Inspection Service, Inc. inspected the Respondent's work and issued a report concerning his findings, which he updated in April 2010. Mr. Sagona determined that there were deficiencies in the Respondent's work in nineteen areas, including the library slab, library foundation, crawlspace insulation, crawlspace gravel/vapor barrier, roof and attic, and guttering and flashing. Mr. Sagona, in a letter dated July 31, 2009, advised the Claimant that there might be additional latent defects in the Respondent's work. (CLAIM #9). Factually, the Claimant was explicitly aware of issues with the gutters no later than January

2009, and on notice of problems with crawlspace waterproofing and roof ventilation no later than January 2009. Additionally, no later than July 2009, the Claimant was aware that an inspector had found deficiencies and that there might be additional latent defects in the specific areas as to which the Claimant says he was unaware of problems.

Legally, the Claimant, no later than January 2009 or, at the latest, July 2009, “had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry.” *Lumsden, et al. v. Design Tech*, 358 Md. 435, 445 (2000), quoting, *Poffenberger v. Risser*, 290 Md. 631, 637 (1981). Once “on inquiry,” a person, under a discovery rule statute of limitations like the one contained in section 8-405(g), is required to then pursue a diligent investigation and file a claim within the applicable statute of limitations. It is the awareness of a problem, and not the completion of an investigation into the problem that starts the limitations period running. “The beginning of limitations is not postponed until the end of an additional period deemed reasonable for making the investigation.” *Lumsden*, 358 Md. at 445 (quoting *O’Hara v. Kovens*, 305 Md. 280, 289 (1986)). The three-year statute of limitations for the four specific items testified to by the Claimant expired in early or mid-2012, well before he filed his claim against the Fund.

The Claimant also argued, based upon *Southern Maryland Oil Co. v. Texas Company*, 203 F. Supp. 449 (D.Md. 1962), that there was an “insuperable barrier” to his filing his claim against the Fund within the three-year statute of limitations. There was no such barrier; the Commission actually directed the Claimant to file a claim and provided him with the form to do so. In *Southern Maryland Oil Co.*, the court merely held that the oil retailer’s cause of action against the oil wholesaler, for indemnification or contribution for damages paid by the retailer to victims who were killed in fires caused by contaminated kerosene, did not accrue at the time of

the fires, but only after the retailer had paid damages to the victims. This case really does no more than state the discovery rule of statute of limitations.

In summary, I find that Claimant's claim against the fund is barred by the applicable three-year statute of limitations. I recommend that it be dismissed on that basis; and, therefore, I need not address the second issue.

**CONCLUSION OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant's claim against the fund is barred by the applicable three-year statute of limitations because the claim was filed on September 26, 2012, and thus was not brought against the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage to his home. Md. Code Ann., Bus. Reg. § 8-405(g) (Supp. 2013).

**RECOMMENDED ORDER**

I RECOMMEND that the Maryland Home Improvement Commission:

DISMISS the Claimant's claim against the Maryland Home Improvement Guaranty Fund; and ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

**Signature on File**

August 12, 2014  
Date Decision Issued

#150976

Robert F. Barry  
Administrative Law Judge