UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2437

September Term, 2015

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WILHELMINA WATNOSKI

v.

MARYLAND HOME IMPROVEMENT COMMISSION

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Leahy,
Beachley,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, James R., J.

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Filed: March 17, 2017

This appeal arises out of a claim filed by Wilhelmina Watnoski, appellant, for monetary compensation from the Home Improvement Guaranty Fund ("Guaranty Fund") administered by the Maryland Home Improvement Commission ("the Commission"), appellee. The Commission referred Ms. Watnoski's case to the Office of Administrative Hearings ("OAH"). After a hearing on July 23, 2013, the Administrative Law Judge (ALJ) recommended that the Commission dismiss the claim as untimely. On March 6, 2015, the Commission issued a final order that amended the factual findings and legal conclusions of the ALJ, dismissed some claims as untimely, and dismissed the claims that were timely for failure to prove a compensable loss.

Ms. Watnoski filed in the Circuit Court for Baltimore County a petition for judicial review. After a hearing on November 16, 2015, the circuit court concluded that Ms. Watnoski's claim should be dismissed, but for reasons different from those given by the Commission. Because the circuit court could not affirm the Commission's decision for the reasons given by it, it remanded the case for further proceedings. This timely appeal followed.

## QUESTIONS PRESENTED

Ms. Watnoski presents two questions for our consideration:

I. Did the Commission err in finding that portions of her claim were time barred?

II. Did the Commission err in calculating Ms. Watnoski's damages?

For the reasons set forth below, we answer question I. in the negative and question II. in the affirmative. Consequently, we remand this case for further proceedings with respect to the calculation of damages.

## FACTUAL BACKGROUND

In February 2007, Terri and Wilhelmina Watnoski entered into a contract with Parrott Construction Company, Inc. ("Parrott") for the purpose of constructing a second-story addition to their one-story home in Dundalk.[1] Work on the project was to begin in June 2007 and be completed within four to five months. The Watnoskis agreed to pay Parrott $235,000.00. Later, the parties agreed to certain additional work and the cost of the project increased. At some point, a dispute arose between the parties regarding the quality and timeliness of the work performed, the details of which we need not discuss in detail. It is sufficient to note that in November and December 2007, Ms. Watnoski brought claimed defects to Parrott's attention. Ms. Watnoski called Parrott in January 2008 requesting that he return to work on the project and, in February 2008, sent Parrott complaints by email regarding work on the project. Also in February 2008, Ms. Watnoski contacted an environmental service to investigate the source of drafts in the house.

In March 2008, the Watnoskis moved back into their home and, thereafter, observed problems with the home's electrical system, specifically switches and outlets that did not work. That same month, representatives from Parrott made their last visit to the property.

[1] Ms. Watnoski, as trustee of the Wilhelmina O. Watnoski Revocable Living Trust, owned the home on Cove Road in Dundalk that is the subject of this appeal.

Ms. Watnoski retained the services of an attorney. The Watnoskis paid Parrott a total of $253,620.84, which was $5,555.40 less than what Parrott claimed it was owed.

On February 28, 2011, Ms. Watnoski, through her attorney, sent a cover letter and "complaint form" to the MHIC. A copy of the "complaint form" was not included in the record extract, but the cover letter to the MHIC provided:

> Your Complaint Form states that if the contractor was licensed (he was) and we wish to make a claim against the Guaranty Fund, we may file the claim separately. However, your office has advised me that a separate claim form can only be obtained from the investigator assigned to this complaint.
>
> **Please accept this letter as notice that we will be making a claim against the Guaranty Fund. Please have the investigator provide my client or me with a claim form immediately**.

(Emphasis in original)

The Commission did not provide Ms. Watnoski or her attorney with a Guaranty Fund claim form until on or about July 28, 2011. Ultimately, on August 15, 2011, the claim form was filed on behalf of Ms. Watnoski. The Commission conducted an investigation and, thereafter, submitted the case to the OAH for a hearing before an ALJ.

After a hearing, the ALJ issued a written "Recommended Decision" in which it found that Ms. Watnoski discovered the "loss or damage" to her home "in late 2007, most likely in November and definitely by the end of December[,]" that her claim was not filed until August 15, 2011, and that the claim was filed nearly four years after she "noticed problems with the 2007 work on her home." The ALJ explained that "the date on which the statute of limitations is tolled is the date when the claimant discovers, or by use of ordinary diligence, should have discovered '**the loss or damage**,' not when the claimant

discovers the '**actual loss**,' which … includes a calculation of the costs of restoration, repair, replacement or completion." (Emphasis in original) The ALJ concluded that Ms. Watnoski's, claim, "filed on August 15, 2011, or arguably constructively filed on February 28, 2011, was not 'brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage' to her home." In accordance with that finding, the ALJ recommended that Ms. Watnoski's claim be dismissed.

After reviewing the ALJ's recommendations, the Commission issued a "Final Order" dated March 6, 2015, in which it amended the ALJ's findings by determining that there was an unpaid balance of $5,555.40 on the contract between Ms. Watnoski and Parrott, that the electrical work performed under the contract was unworkmanlike and inadequate, and that Ms. Watnoski paid $3,900.00 to correct Parrott's electrical work. The Commission concluded that, because Ms. Watnoski had requested a claim form on February 28, 2011 and, due to circumstances beyond her control, was not provided that form until July 28, 2011, her claim against the Guaranty Fund would be considered "constructively filed" on February 28, 2011. In addition, the Commission concluded that with the exception of the alleged defects in the electrical work, Ms. Watnoski "was on inquiry notice of all other alleged defects more than 3 years prior to February 28, 2011." As a result, all of her claims were barred by the three-year period of limitations set forth in § 8-405(g) of the Business Regulation Article (BR) of the Maryland Code,[2] except that

[2] At the time Ms. Watnowski's claim was filed, § 8-405(g) provided, as it does now:

portion of the claim concerning the electrical work. With respect to the claims pertaining to the electrical work, because Ms. Watnoski's claim of $3,900.00 for the repair of the electrical work was less than the unpaid balance on the contract, the Commission concluded that she failed to meet her burden of proving a compensable actual loss.

On March 18, 2015, Ms. Watnoski filed a petition for judicial review in the Circuit Court for Baltimore County. After a hearing on November 16, 2015, the circuit court held that the letter and complaint form filed on February 28, 2011 were not sufficient to begin a proceeding to recover from the Guaranty Fund. The circuit court further held that there was substantial evidence in the record to support the findings that Ms. Watnoski discovered the alleged loss or damage "for all of her claims by April 2008 at the latest (including for the electrical work)" and that she "needed to file a claim against the [Guaranty] Fund by April 2011, at the very latest, to be within the limitations period and be entitled to compensation from the Fund for any of the alleged loss or damage." As her claim was not filed until August 15, 2011, the court concluded that Ms. Watnoski's claim was not timely. The court agreed with the Commission that Ms. Watnoski's claim should be dismissed, but because it reached this conclusion for different reasons, the court remanded the case for further proceedings. This timely appeal followed.

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> (g) 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 (2010 Repl. Vol., 2011 Supp.), § 8-405(g) of the Business Regulations Article ("BR").

## DISCUSSION

### I.

### A. Standard of Review

Judicial review of an administrative decision "generally is a 'narrow and highly deferential inquiry.'" *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 733 (2010)(quoting *Maryland-Nat'l Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 (2009)). We look through the circuit court's decision and evaluate the decision of the agency. *Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md. App. 172, 181 (2010); *People's Counsel for Baltimore County v. Surina*, 400 Md. 662, 681 (2007). Our task is to determine whether "'there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012)(quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)). Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Caucus Distributors, Inc. v. Maryland Securities Commissioner*, 320 Md. 313, 323-24 (1990).

With regard to the factual findings of the Commission, it is well settled that a reviewing court may not substitute its judgment for that of the administrative agency or make its own findings of fact when reviewing the decision of an ALJ. *Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 250 (2003). We must affirm the agency's decision "'if, after reviewing the evidence in a light most favorable to the

agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Miller v. City of Annapolis Historic Preservation Comm'n*, 200 Md. App. 612, 632 (2011)(quoting *Montgomery County v. Longo*, 187 Md. App. 25, 49 (2009)). As for the agency's conclusions of law, a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers." *Employees' Ret. Sys. of City of Baltimore v. Dorsey*, 430 Md. 100, 111 (2013). We need not, however, "affirm an agency decision premised solely upon an erroneous conclusion of law." *Id.* (internal quotations omitted).

**B. Maryland Home Improvement Law**

In 1962, the General Assembly enacted the Maryland Home Improvement Law, now codified at BR § 8-101 *et seq*. The law established the Maryland Home Improvement Commission within the Department of Labor, Licensing, and Regulation. BR § 8-201. We have long recognized the Maryland Home Improvement Law as a regulatory scheme designed for the protection of the public. *Landsman*, 154 Md. App. at 248. It was intended, in part, to provide "for the regulation of the home improvement business" and to establish "a system of licensing certain contractors and salesmen under a new administrative agency to be known as the Maryland Home Improvement Commission." *Id.* (citing *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 126 (2003)).

In 1981, the General Assembly enacted Subtitle 4 of the Home Improvement Law, establishing the Home Improvement Guaranty Fund for the purpose of providing a remedy for homeowners who suffer an "actual loss that results from, [*inter alia*] an act or omission by a licensed contractor." *Id*. (quoting BR § 8-405(a) and citing *Fosler*, 376 Md. at 131).

"Subtitle 4 sets forth an administrative remedy" that provides for claims against the Fund, contested case hearings before the Commission, and payments by the Guaranty Fund to claimants. *Id.*

BR § 8-406 sets forth the procedure for filing a claim for recovery from the Fund:

> 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; and
> (4) any other information that the Commission requires.

BR § 8-406.

The 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." BR § 8-405(g). The homeowner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contract … as found by the Commission or a court of competent jurisdiction." BR § 8-405(a). The phrase "actual loss" is defined as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." BR § 8-401.

### C. Timeliness

Ms. Watnoski contends that the Commission incorrectly "began the running of the statute of limitations prior to February 28, 2008." She argues that running the limitations period from November or December 2007, when she became aware of certain problems with Parrott's workmanship, not including the electrical work, was improper because her relationship with Parrott was contractual in nature. As a result, "the proper measure of the

statute of limitations [was] the date of the breach of contract" because that is the date when she suffered an "actual loss." According to Ms. Watnoski, prior to March 2008, Parrott never "expressed a refusal to perform," and she did not "deny him the opportunity to continue performance[,]" so no breach of contract or anticipatory breach can be said to have occurred before that time. As long as Parrott was willing to perform the contract, the deficient workmanship was subject to cure and she suffered no "loss." We disagree and explain.

The plain language of the statutory scheme governing claims against the Guaranty Fund makes clear 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. BR § 8-405(g). Similarly, COMAR 09.08.03.02(G) provides that "[a] claim may not be brought against the Fund after 3 years from the date that the claimant discovered, or by exercise of ordinary diligence should have discovered, the loss of damage." Contrary to Ms. Watnoski's argument, the timeliness of her claim is not governed by case law pertaining to breach of contract actions. Rather, this case involves an administrative action for the recovery of funds pursuant to the Business Regulation Article and applicable regulations.

When Ms. Watnoski submitted her complaint to the Commission on February 28, 2011, she made clear her intent to file a claim against the Guaranty Fund and specifically requested that an investigator provide her with a claim form. Recognizing its error in failing to send Ms. Watnoski in a timely fashion the form required to make a claim against the Guaranty Fund, the Commission accepted her August 15, 2011 claim against the

Guaranty Fund as if it had been filed on February 28, 2011. In light of the Commission's acknowledged failure to provide the required form in a timely fashion, the fact that the Home Improvement Law is designed for the protection of the public, and the remedial nature of the Guaranty Fund, we find no error in the Commission's decision to accept Ms. Watnoski's claim form as if it had been filed on February 28, 2011.

Even using that date, however, there was substantial evidence to support the Commission's finding that, with the exception of certain problems with the electrical work, Ms. Watnoski was on notice of the problems with the work performed at her home by Parrott no later than November or December 2007, when "progress of the work essentially came to a halt."

Claims pertaining to the electrical work, and demolition expenses associated with the electrical work, were timely filed. There was substantial evidence to support the Commission's determination that Ms. Watnoski was on notice of defects in the electrical work in March 2008, when she moved back into the home and discovered that switches and outlets did not work, and certainly by April 2008, when she "plugged an appliance into an electrical outlet in the kitchen and the outlet burst into flames." As a result, Ms. Watnoski's claim, accepted by the Commission as having been filed on February 28, 2011, was timely with respect to claims relating to the electrical work and the demolition work occasioned by repairs to the electrical system.

Although there was no finding with respect to the timeliness of Ms. Watnoski's claim for repairs to the air conditioning, the Commission found that on June 25, 2008, Modern Air Conditioning & Heating was retained to address issues with the heating,

ventilation and air conditioning system. The timeliness of the claim for repairs to the air conditioning should be addressed on remand.

**D. Commission's Findings**

The factual findings made by the ALJ, and adopted by the Commission, included a finding that Parrott's electrical subcontractor was a licensed electrician. On October 30, 2008, a code inspector advised Ms. Watnoski to "remove and replace all damaged wiring on the first floor of the home and to hire a licensed electrician to check the remainder of the home for violations." On December 1, 2008, the code inspector issued a citation to Ms. Watnoski for work performed by an unlicensed electrician. The Commission found that Ms. Watnoski and her husband performed some electrical work in the home after Parrott ceased work on the project, and that a second citation was issued to Ms. Watnoski on December 19, 2008, for work performed at the home by an unlicensed contractor. There was no finding, however, as to the specific work performed by Parrott, whether any of that electrical work was the subject of the citations, or whether Ms. Watnoski, her husband, or someone else, performed that work. Further, although there was a finding that Ms. Watnoski paid $3,900 to repair the electrical work, there were no findings with regard to the demolition work that was required to make those electrical repairs.

With respect to the air conditioning in the home, the Commission found that on June 25, 2008, Ms. Watnoski hired Modern Air Conditioning & Heating to address issues with the heating, ventilation and air conditioning systems, at a cost of $1,366.00. The Commission did not make any finding as to timeliness or as to whether that work was required due to Parrott's unworkmanlike or inadequate work. Accordingly, we shall

remand the case for further findings on the issues of the electrical work and the air conditioning.

**E. Damages**

Ms. Watnoski contends that the Commission erroneously calculated her loss related to the electrical work at $3,900.00 because it failed to consider the testimony of Michael Fortune that repair of the electrical work required "substantial demolition work" which, along with the new wiring, cost approximately $11,000.00. In addition, she argues that the Commission failed to include in its calculation of the damages $1,366.00 for repairs to the air conditioning system for problems that were discovered in June 2008.

In its final order, the Commission failed to identify specifically the electrical work that was found to be unworkmanlike and inadequate, failed to mention demolition work or Mr. Fortune's testimony, and failed to make any finding with respect to the air conditioning system, except that Ms. Watnoski paid $1,366.00 for the repair of "a leak in the existing air condenser in the attic." The Commission indicated that it would rely upon a "unique measure of actual loss" pursuant to COMAR 09.08.03.03B(3).[3] In making that calculation,

[3] COMAR 09.08.03.03B(3) addresses the measure of awards from the Guarantee Fund and provides that:

> (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.

the Commission indicated only that the amount paid to correct the electrical work was $3,900.00. It did not address the $11,000 that was claimed for both the electrical repairs and the associated demolition work or the amount claimed for repairs to the air conditioning system. In light of the Commission's failure to address these issues, we shall remand for further proceedings.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND TO THE MARYLAND HOME IMPROVEMENT COMMISSION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY THE APPELLEE.**

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(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.