

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF ANN LEWIS,</b></p> <p><b>CLAIMANT,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF EDWARD RAY,</b></p> <p><b>T/A ONE ON ONE CONSTRUCTION,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE A. J. NOVOTNY, JR,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH NO.: DLR-HIC-02-13-08793</b></p> <p><b>* MHIC NO.: 12 (90) 1435</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p>
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**RECOMMENDED DECISION**

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**STATEMENT OF THE CASE**

On October 15, 2012, Ann Lewis (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$2,070.00 for actual losses allegedly suffered as a result of a home improvement contract with Edward Ray, t/a One on One Construction (Respondent).

After investigation, on January 25, 2013, the Commission issued a Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH), where it was received on February 4, 2013. On June 20, 2013, I held a hearing on the Claimant’s claim at the OAH in

Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312 and 8-407 (2010 & Supp. 2012).

The Claimant appeared and represented herself. The Respondent appeared and represented himself. The Fund was represented by Eric London, Assistant Attorney General.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.01.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

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

Fund 1 - Notice of Hearing, dated March 19, 2013, with certified mail receipt

Fund 2 - Hearing Order, dated January 25, 2013

Fund 3 - Respondent's licensing information, dated April 11, 2013

Fund 4 - Letter dated October 31, 2012 from MHIC to Respondent, along with a copy of the claim form, received by the MHIC October 15, 2012

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

Cl. 1 - Permit to replace a deck from the Baltimore County Departments of Permits, dated June 3, 2010

Cl. 2 - Copy of check number 348, dated June 19, 2010

Cl. 3 - Packet of photographs, deck frame, lettered A-P

Cl. 4 - Packet of photographs, deck top, lettered A-F

- Cl. 5 - Handwritten letter from Respondent to Claimant, undated
  - Cl. 6 - Handwritten letter from Respondent to Miss Isbister (Better Business Bureau), undated
  - Cl. 7 - Handwritten letter from Respondent to Better Business Bureau, undated
  - Cl. 8 - Better Business Bureau Complaint Activity Report with entries March 12, 2012 – June 7, 2012
  - Cl. 9 - MHIC Complaint Form, signed June 14, 2012
  - Cl. 10 - MHIC Proposed Order, dated December 6, 2012
  - Cl. 11 - Long Fence Company, Inc. (Long Fence) proposal, dated September 20, 2012
  - Cl. 12 - Letter from MHIC to Claimant, dated January 25, 2013
- I admitted the following exhibits on the Respondent's behalf:
- Resp. 1 - Packet of fourteen letters of reference
  - Resp. 2 - PaintSource.net webpage, printed June 18, 2013

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

**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, License No. 01-40487. (Fund 3).
2. On or about June 3, 2010, the Claimant and the Respondent entered into a verbal home improvement contract wherein the Respondent was to remove the existing rear deck from

the Claimant's house at 23 Turk Garth, Catonsville, Maryland 21228, and replace the deck with a composite wooden deck, steps and railing.

3. The Claimant paid the Respondent the agreed upon price of \$6,000.00 on June 19, 2010.
4. When the decking materials were delivered, the Claimant wanted the deck constructed as quickly as possible.
5. The Respondent advised the Claimant that the composite decking should weather for a week or more, before being used, in order for it to acclimate to the humidity.
6. When the Claimant insisted that the deck be constructed as soon as possible, the Respondent completed the deck. The Respondent did so despite having misgivings about the propriety of cutting and fastening non-acclimated composite decking and the risk of shrinkage.
7. Thereafter, although the deck was structurally sound, some of the decking cracked and shrank, exposing and misaligning the seams. The steps and wrap (side boards surrounding the deck) expanded and warped, making the steps and some of the deck unlevel, and leaving noticeable bulges and gaps. (Cl. 3 and 4).
8. Although the Claimant requested that the Respondent return and repair the deck, the Respondent refused, initially because it was his busy season, and thereafter because he felt that he had warned the Claimant of the risks of constructing the deck before the composite material had acclimated and because the Claimant had filed complaints against him with the Better Business Bureau and MHIC.
9. On September 20, 2012, the Claimant obtained a proposal from Long Fence, a licensed home improvement contractor to replace 44 feet of deck wrap, along with steps, brackets,

a post and end cap, as well as to screw down all rail sections that were warped, misaligned or cracked. (Cl. 11). The estimated cast was \$2,070.00.

10. The Claimant's actual loss is \$2,070.00.

### DISCUSSION

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) (Supp. 2012). *See also* COMAR 09.08.03.03B(2). 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). In order to be compensated by the Fund, the Claimant bears the burden of proving by a preponderance of the evidence that he or she suffered an actual loss incurred as a result of misconduct by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2012) and § 8-407(e) (2010); COMAR 09.08.03.03.

There is no dispute that the Respondent was a licensed home improvement contractor at the time that he entered into the contract with the Claimant. (Fund 3). There is no dispute that the deck displays warped, shrunken, misaligned decking, wrap and steps. (Cl. 3 and 4).

The Maryland Court of Appeals has defined "workmanlike manner" as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952), the Court held, "[t]he obligation to perform work with skill and care is implied by law and need not be stated in [any] contract." In *K & G Construction Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard "workmanlike manner" with the implied standard of performance discussed in the *Gaybis* case. The *K & G* Court cited the *Gaybis* case for authority that the "workmanlike-manner" wording was equivalent to the "skill-and-care" wording. The

rule in the *Gaybis* case was reaffirmed in *Worthington Construction Corp. v. Moore*, 266 Md. 19, 22 (1972).

Additionally, in B.A. Garner, *A Dictionary of Modern Legal Usage*, 582 (1987), “workmanlike” is defined as “Characteristic of or resembling a good workman: businesslike.” “Workmanlike” is also defined as “Typical of or befitting a skilled workman or craftsman.” *Webster’s II New Riverside University Dictionary* 1328 (1994). Most recently *Merriam-Webster’s Collegiate Dictionary* 1443 (11<sup>th</sup> ed. 2006), defines workmanlike as “Characterized by the skill and efficiency typical of a good workman.” Therefore, in the context of this case, unworkmanlike means that the particular home improvement work has not been done with the requisite skill and care typical of a good workman.

There was no expert testimony. However, the photographs quite clearly show evidence of unworkmanlike home improvements. Even without an expert, it is clear that the deck is not only unsightly, but passage ways are not level, with warped steps and side wrap. It is unsafe. The Respondent argued that the Claimant assumed the risks of a poor, unworkmanlike result because he warned her that there would be problems with the composite material. When she insisted that the work begin despite the warning, the Respondent was faced with the choice of either proceeding with a project in which he clearly anticipated problems or declining to proceed, and angering his customer.

I conclude that the responsibility for the poor deck condition is with the Respondent, as the licensed, experienced professional. Despite his expertise and experience with composite deck material, the Respondent installed the composite material prior to allowing it to cure properly. The Respondent proceeded in an unworkmanlike manner when he commenced construction knowing that there was, according to his own testimony, a high probability of some type of

material failure. In the alternative, if the Respondent had not proceeded, while the Claimant may have been unhappy about a delay for a week or more, there would not have been the subsequent loss and the resultant claim. I conclude that the proper, workmanlike choice would have been to delay construction until the composite material had time to acclimate. Therefore, I find that when portions of the composite materials' failure occurred, it was the result of Respondent's unworkmanlike construction. Also I note that the Respondent has unreasonably refused to return to repair or otherwise remediate the unworkmanlike home improvement.

The Fund did not dispute that the Respondent performed unworkmanlike construction. Although the Fund was critical of the Long Fence proposal because it did not itemize the costs for the different deficiencies, I conclude that it addresses everything noted as defective and unworkmanlike in the testimony and photographs. (Cl. 11; Cl. 3 and 4). It is clear that the deck did not need to be totally replaced; it was structurally sound and not all of the deck boards warped or buckled. I accept the Long Fence proposal as a reasonable cost to remedy the Respondent's unworkmanlike home improvement.

MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula, offers an appropriate measurement in this case since the Claimant has the Long Fence proposal to repair the work:

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

COMAR 09.08.03.03B(3)(c).

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Total Amount Paid to the Respondent	\$ 6,000.00
Amount to Correct or Complete Work	<u>+\$ 2,070.00</u>
	\$ 8,070.00
Amount of Original Contract	<u>-\$ 6,000.00</u>
<b>Amount of Actual Loss</b>	<b>\$ 2,070.00</b>

The Claimant's actual loss in this matter is \$2,070.00. The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (e)(1) and (5) (Supp. 2012). The Claimant paid \$6,000.00 to the Respondent, and her actual loss, which is \$2,070.00, is less than the \$20,000.00 maximum payable from the Fund, as well as being less than what she paid to the Respondent. Hence, the Claimant is entitled to reimbursement from the Fund in the amount of \$2,070.00.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has established that she sustained an actual loss under Section 8-401 of the Business Regulation Article as a result of the Respondent's work being unworkmanlike and in violation of section 8-311(a)(10). Md. Code Ann., Bus. Reg. § 8-311(a)(10) (2010). Therefore, the Claimant is entitled to be compensated from the Fund for the acts or omissions of the Respondent in the amount of \$2,070.00. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(e)(5) (2010 & Supp. 2012); COMAR 09.08.03.03B(3)(c).

### **RECOMMENDED ORDER**

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

**ORDER** that the Claimants be awarded \$2,070.00 from the Maryland Home Improvement Guaranty Fund;



**ORDER** that the Respondent be 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 Commission, Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and,

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

**Signature on File**

September 10, 2013  
Date Decision Mailed

A. J. Novotny Jr.  
Administrative Law Judge

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