

IN THE MATTER OF THE CLAIM	* BEFORE STEVEN V. ADLER,
OF BETTY B. HUGHES AND	* AN ADMINISTRATIVE LAW JUDGE
GEORGE A. HUGHES,	* OF THE MARYLAND OFFICE
CLAIMANTS,	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	* OAH No.: DLR-HIC-02-14-44566
OMISSIONS OF JOE A. SANDERS,	* MHIC No.: 14 (90) 1263
T/A SANDERS MASONRY, INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On October 6, 2014, Betty B. Hughes and George A. Hughes, (collectively, Claimants and individually, Mr. Hughes and Ms. Hughes) filed a claim (Claim) with the Maryland Home Improvement Commission's (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,500.00 in alleged actual losses suffered as a result of their home improvement contract with Joe A. Sanders, trading as Sanders Masonry, Inc., (Respondent).

On February 24, 2015, the Office of Administrative Hearings (OAH) received a request for accommodations for persons with disabilities (Request for Accommodations) filed by the Claimants. In their Request for Accommodations, the Claimants indicate that due to certain medical conditions from which Ms. Hughes's suffers, an oral amplification system or oral interpreter was needed in order to allow Ms. Hughes to provide testimony and present her case. The Request for Accommodations was supported by a letter from Ms. Hughes's treating physician. I granted the request and OAH purchased sound amplification equipment exclusively for this purpose. Code of Maryland Regulations (COMAR) 28.02.01.09C.

I convened the hearing as scheduled on June 8, 2015 at the Largo Government Center in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimants were present and represented themselves. L. Paul Jackson, II, Esquire, of Shipley and Horne, P.A., represented the Respondent, who was present. Hope M. Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

Although Ms. Hughes made every effort, it became patently clear to me and to all parties that despite the use of sound amplification equipment, it was not possible to accurately discern Ms. Hughes's speech. I considered whether it would be possible to secure the services of an oral interpreter but despite such services the same problem would remain, which is the inability to accurately discern any or all of Ms. Hughes's speech. After discussion with the parties, I proposed that we continue the proceeding to allow Ms. Hughes to pre-file written testimony with the OAH and developed a schedule for submission of the testimony, written cross-examination from the other parties and response to any cross-examination from Ms. Hughes. COMAR 28.02.01.21E. The parties agreed that this was most fair and reasonable way to move forward, in light of the unique circumstances, and agreed and fully complied with the timeline for

submission. The case was continued and reset for hearing on July 9, 2015 at the same location. All parties present for the initial proceeding were present for the subsequent hearing with the exception of Ms. Sachs, who was unable to be present due to a conflict with her litigation schedule. The Fund was represented by Kris M. King, Assistant Attorney General, DLLR, at the July 9, 2015 hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), COMAR 09.01.03, 09.08.02, and 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following Joint Exhibits on behalf of all parties:

- Jt. Ex. 1 - Written Reply of Ms. Hughes to the MHIC Guaranty Fund, date stamped received by the OAH on June 23, 2015, pp.1-5
- Jt. Ex. 2 - Written Reply of Ms. Hughes to Sanders Masonry, Inc., date stamped received by the OAH on June 23, 2015, pp. 1-3

I admitted the following exhibit on the Claimants' behalf:

- CL. Ex. 1 - Claimants' Written Testimony, unnumbered and dated June 15, 2015, with the following attachments: ServPro contract, unnumbered and dated September 4, 2011; Contract between the Claimants and the Respondent, unnumbered and dated October 29, 2011; Contract between the Claimants and the Respondent, unnumbered and dated February 7, 2013; Photographs of the interior and exterior of the Claimants' home, unnumbered and undated; Contract Proposal from

Michael & Son Services, Inc., unnumbered and dated August 28, 2014; and Estimate/Proposal For New Work/New Contractor, unnumbered and dated November 5, 2013 (30 pages)

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - OAH Notice of Rescheduled Hearing, dated June 10, 2015
- GF Ex. 2 - MHIC Hearing Order, dated November 19, 2014
- GF Ex. 3 - Department's I.D. Registration and Professional License History, dated June 3, 2015
- GF Ex. 4 - MHIC Home Improvement Claim Form, dated October 2, 2014
- GF Ex. 5 - Letter from Joseph Tunney, Chair, MHIC, to the Respondent, dated October 10, 2014
- GF Ex. 6 - Written Cross-Examination of Ms. Hughes by the MHIC Guaranty Fund, date stamped received by the OAH on June 23, 2015

There were no other exhibits offered or admitted.

Testimony

The Claimants testified by and through their pre-filed written testimony and did not elect to supplement it with any further testimony nor with that of any witnesses at the hearing. The Claimants participated in the entirety of the proceeding and were afforded the opportunity to cross-examine the opposing party and all adverse witnesses offering testimony. The Claimants elected to cross-examine the Respondent and one of his witnesses through written questions read into the record by Mr. Hughes.

The Respondent testified and presented the testimony of Gregory Sanders and Frank Prioleau, then employees of the Respondent.

The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACT

I find the following facts, by a preponderance of the evidence:

1. The subject property at 801 Cypress Point Circle in Bowie, Maryland (Claimants' home) was built in approximately in 1980 and purchased by the Claimants in November 2002.

2. At the time of the Claimants' purchase, the basement was finished and consisted of one bedroom, one bathroom and additional living space; the bathroom was fully functional and in working order.

3. In August 2011, the Claimants' home suffered water damage caused by Hurricane Irene.

4. On September 4, 2011, the Claimants contracted with ServPro to remediate the water damage to the basement of the Claimants' home.

5. After the remediation efforts by ServPro, but prior to the start of any work by the Respondent, all standing water in the basement was dried and the damaged walls were removed. However, the bathroom fixtures remained, including the raised platform upon which they formerly sat.

6. On October 29, 2011,¹ the Claimants and the Respondent entered into a contract (the October contract) to perform the following work:

- Remove and replace all loose and rusted metal corner beads
- Install new insulations in the low open area of walls
- Install new drywall, tape joints, spackle, sanding and apply two (2) coats of paints owners supp [sic]
- Install new doors with existing hardware, new base board and ¼ round along floor level
- Reinstall existing Mirror panel closet door with new tracks
- Reinstall existing tiles around tub walls and install new standard tile in place

¹ The contract is dated October 29, 2011 but executed by Ms. Hughes on October 31, 2011. I will use the former date for simplicity as the parties indicated this was the date of contract in their testimony, argument and pleadings.

- Install new sink vanity with standard fixtures and remove existing wall electric plug from near water line
- Enclose open water line behind shower wall
- Install new raised flat form² [sic] with new toilet and repair water leak between stud walls
- Install new 12" x 12" vinyl tile in utility room³
- Clean up and haul away above service debris
- Option: #2 Remove old adhesive and install new standard 12" x 12" ceramic tile thru out the entire basement except utility Room

CL Ex. 1 (all spelling and capitalization as in original) (emphasis and punctuation omitted).

7. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC registration number 12682.
8. The work began in November 2011 and was completed on December 5, 2011.
9. The original agreed-upon contract price was \$16,430.00, which was subsequently paid in full.
10. After completion of the October contract, the new fixtures, including the toilet placed on a rebuilt raised platform, were tested for leaks by the Respondent and no leaks were found.
11. Approximately sixty days after completion of the October contract, the Claimants observed water damage in the form of stains on the baseboards and raised platform in the basement bathroom and the floor of the adjoining living space.
12. The Claimants contacted the Respondent and advised him of the water leakage.
13. The Respondent returned to the Claimants' home in approximately June 2012 and tightened and tested fixtures in an attempt to cure the water leakage, but to no avail.

² From the argument and testimony of the parties, I understand this to be a platform and for clarity, I will use the term "platform" throughout this Decision.

³ The parties agreed at the hearing that this work was not performed because it was encompassed within the selected Option 2.

14. In January 2013, the Respondent again returned to the Claimants' home, accompanied by a licensed plumber, Chauncey Harris, and employed a diagnostic tool in an attempt to discover the source of the leak. The Respondent determined the source of the leak to originate from a water line running from a sink in the garage.

15. On February 7, 2013, the Claimants and the Respondent entered into a second contract (the February contract) to perform the following work:

- Trouble shoot through walls to locate leak with camera after checking several locations and found leak behind tub and concrete wall line from garage sink
- Remove ceramic tile, sheet rock and existing leaking line on the back wall of tub from garage sink to sink in utility room.
- Install 70 linier [sic] feet of copper line in place
- Install new green board sheet rock and new tiles in place
- Replace 24" x 12" linier [sic] feet of deteriorate [sic] sheet rock on the low section of bath room walls tape spackle sand and paint
- Replace water damage baseboard and door trim in bath room
- Clean up and haul away debris

CL. Ex. 1 (all spelling, punctuation and capitalization as in original).

16. The agreed-upon price for the February contract was \$2,525.00, which was subsequently paid in full.

17. In October 2013, the Respondent returned to the Claimants' home after the Claimants reported continued leaks.

18. The Claimants presented the Respondent with a proposal of work completed by E and B Plumbing indicating the need for installation of a sewer injector to remedy the continued water leaks and requested that the Respondent return the monies they paid to him.

19. The Claimants and the Respondent were unable to come to a mutually satisfactory agreement as to how to move forward. There were no further interactions between the two parties after October 2013, and this proceeding was subsequently commenced.

DISCUSSION

Governing Law, Controlling Regulations and Burden of Proof

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2015).

At a hearing on a claim for reimbursement from the Fund, the Claimants have the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *Coleman v. Anne Arundel County Police Dep’t*, 369 Md. 108, 125 n.16 (2002); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I find that the Claimants have not proven eligibility for reimbursement from the Fund.

Argument and Testimony of the Parties

The Claimants testified that they had not experienced any water leakage in the basement bathroom of their home prior to the time of original contract with the Respondent, and that only after the Respondent completed work on the October contract did they begin to see staining and other signs of water damage. The Claimants averred that they contacted the Respondent to inform him of the water damage within sixty days of completion of the October contract and that

the Respondent eventually identified what he indicated to be the source of the leak coming from a sink in the garage. The Claimants stated that they entered into the subsequent February contract with the Respondent to cure this water leak because, at that time, they accepted the Respondent's assessment that the source of the leak was outside the scope of the work contemplated and performed in the October contract. After completion of the February contract, the Claimants continued to experience water leakage in their basement bathroom and subsequently contacted two independent firms to solicit bids and estimates to cure the continued leak. In November 2013 and August 2014, respectively, the Claimants contacted E and B Plumbing and Michael and Son Services, Inc., each of whom provided written proposals stating that a sewer injector⁴ was needed to address the continued water leaks. The Claimants stated they discussed this with the Respondent, who stated that he could have installed a sewer injector but that it would have been cost-prohibitive, so he did not. The Claimants maintain that despite the two agreements entered into and the monies paid to the Respondent in good-faith, their basement bathroom remains unusable and they continue to observe water damage and staining. Thus, the Claimants seek reimbursement from the Fund for the entirety of the monies they paid to the Respondent in both the October and February contracts as they believe he performed inadequate work and acted in bad-faith throughout his dealings with them.

The Respondent argued that he performed all of the work agreed to in both the October and February contracts in a workmanlike and satisfactory way. The Respondent testified that he never contemplated the need for a sewer injector while bidding on and performing the work in the October and February contracts for several reasons; chiefly: that he could not see the sewer

⁴ This is described as a "sewage ejector" in the proposal from Michael and Son, Services, Inc. CL. Ex. 1. I am satisfied that these words refer to the same device referred to as a "sewer injector" by the parties in the hearing and in the written testimony and cross-examination. As the latter term was used most frequently by the parties, for simplicity and clarity, I will also employ the term "sewer injector" in this Decision.

lines to know if they were above or below ground such that a sewer injector might be necessary; that the work he was performing was to an existing bathroom that was in use and already built on a platform; and that the scope of work called for did not implicate any plumbing work, such as installing a sewer injector, but merely the replacement of existing fixtures and structures, such as the raised platform, which were damaged in the aftermath of Hurricane Irene. The Respondent agreed that there was some discussion with the Claimants regarding the source of the water leak being the outside sewer line, on a remedial visit in October 2013, after the completion of both the October and February contracts. However, the Respondent denied ever stating that he could have installed a sewer injector but choose not to due to cost. The Respondent stated that the Claimants requested a return of the monies paid to him and that they did not wish for him to perform any further work, remedial or otherwise, to their home. The Respondent testified that although he agreed to return \$500.00 to the Claimants solely out of a desire to be kind, he ultimately never remitted any monies.

Testimony of the Respondent's Witnesses

Gregory Sanders, the Respondent's son and then an employee of the Respondent's masonry firm, testified that he was involved in the home improvement work performed at the Claimant's home during the time periods relevant to this proceeding. Mr. Sanders testified that he was present and working on the exterior trim of the home during January and February 2013 when the leak from the garage sink was identified. He testified that he saw a slow stream of dripping water that was clear and did not have any foul odor emanating from it, from which he inferred that the leak was caused by some source other than the sewage lines and the toilet. Mr. Sanders also testified that Mr. Hughes told him that the basement bathroom was in regular use prior to the water damage the Claimants suffered during Hurricane Irene.

Testimony was also provided by Frank Prioleau, who was employed at all relevant times by the Respondent's firm. Mr. Prioleau testified that he installed a new toilet on the rebuilt platform and tested that toilet approximately four times by serially flushing it, without incident or evidence of a leak.

Position of the Fund

In its closing argument, the Fund contended that the issue of the need for installation of a sewer injector in the Claimants' home is a highly technical issue that required expert testimony to resolve, of which none was provided by any party in the proceeding. The Fund offered that in its estimation, at the close of evidence, it was not at all clear what caused the leak and while it may have been for the exact reasons the Claimants allege, that is, the Respondent's failure to adequately perform home improvement work to the basement bathroom of the Claimants' home, they have not proven that their account of events is "more likely so than not so" to have occurred, and so their case must fail.

Analysis

This case presented unique challenges in assessing credibility. The Claimants, due to medical necessity, submitted their testimony in a written format and were cross-examined in the same manner, which did not allow me the opportunity to observe their behavior during their case presentation. Much of the Claimants' testimony was in bullet points and short, incomplete sentences referring to other documents or responding to the assertions the Respondent made before the MHIC in June 2014.⁵ There were also certain inconsistencies in the Claimants' account. Specifically, the Claimants' written testimony tended to suggest that there was no existing platform in place in the bathroom. CL Ex. 1. Weighing the evidence of record, I must

⁵ Any statements made by the Respondent before the MHIC on that date were not made a part of the record before me in this proceeding.

disagree and conclude that there was an existing platform in place in the basement bathroom, which the Respondent removed and replaced with a new platform. This conclusion is supported by the plain language of the October contract calling for installation of a “new” platform, the testimony of the Respondent and his witnesses that an existing platform was in place, but that the wood beneath it was rotten and required replacement, and in the cross-examination of the Respondent conducted by the Claimants themselves in which they acknowledged there was an existing platform.

The Respondent provided extensive testimony before me but it was halting, often non-responsive to the direct question posed, required extensive use of leading questions from both his own counsel and the Fund to eventually elicit reasonably direct responses, and was not without inconsistency. While some of this reticence, hesitancy and apparent confusion, may have been occasioned by the substantial length of time between performance of the work and the date of hearing, it did not convey to me the Respondent’s unequivocal credibility in this matter.

However, I do not find that the parties’ credibility is ultimately dispositive of this case. Instead, I conclude that this case turns on the issue of whether installation of a sewer injector was necessary, and whether the Respondent’s failure to install one is *per se* an “...unworkmanlike, inadequate, or incomplete home improvement,” rather than as in many cases, the mere resolution of a pure dispute of fact between two parties who are equally situated to offer observations. Md. Code Ann., Bus. Reg. § 8-401. In the instant matter, no party introduced, or sought to introduce, the testimony of any witness who was offered or qualified as an expert in the field of home improvement or plumbing. The only opinion statements provided were in the form of written proposals submitted by E and B Plumbing and Michael and Son, Services, Inc., both of which

were admitted into evidence for their factual observations and not their statements of opinion.⁶ Thus, the entirety of the record before me is silent and devoid of any facts or qualified expert opinions from which I could reasonably infer that the failure to install a sewer injector here violated the controlling law and regulations and rendered the job “unworkmanlike, inadequate, or incomplete.”

There is no dispute the Respondent performed the work he was contracted to perform in both the October and February contracts and was paid in full on each occasion by the Claimants. There is equally no dispute that the basement bathroom in the Claimants’ home continues to leak and evince water damage in the form of staining around the platform, baseboards and the floor. However, that does not mean, from these facts standing alone, that I can conclude that the home improvement work performed by the Respondent was improper.

As the finder-of-fact, I am permitted to draw reasonable inferences from evidence in the record, but I may not make conclusions that strain logic or require leaps of reasoning. *See Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 499 (2002); *North v. North*, 102 Md. App. 1 (1994); *Neal v. State*, 191 Md. App. 297 (2010). The Claimants’ assertion, standing alone, that the continued water leaks were caused by the Respondent’s failure to install a sewer injector rests solely on their own speculation, unsupported by expert testimony, and requires just such an impermissible and strained leap of reasoning.

⁶ There was respectful but strenuous objection from the Fund as to the admission of these documents due to the want of foundation to support the opinions expressed therein. I agreed with the Fund’s assessment regarding the opinion statements contained within these proposals but I ultimately admitted the documents, over objection, noting that they were not being admitted for their opinions, for which the Fund correctly observed do not have a proper basis established, but instead only for their factual observations. *Myers v. Celotex Corp.*, 88 Md. App. 442, 454 (1991) (“[t]he general rule in this State is that all evidence that is relevant to a material issue is admissible except as otherwise provided by statutes or by rules applicable in Maryland courts”) (internal citation omitted)); Md. Code Ann., State Gov’t § 10-213 (2014); COMAR 28.02.01.21B.

The heart of the Claimants' argument appears to be that while they did not explicitly contract for installation of a sewer injector with the Respondent in either the October or February contracts, they ought not to have needed to, as workmanlike and adequate home improvement work requires the installation of such a device in this circumstance. Aside from the Claimants arguing this by implication, they did not explicitly articulate this position or provide any facts or expert opinions to support their contention.

The Respondent testified that had he observed sewer lines that were below ground, he would have had reason to believe a sewer injector might have been necessary to pump the sewage out from the house. However, he explained that he did not have occasion to observe the placement and location of the sewer lines, nor would he typically have this opportunity in a job of this nature involving the replacement of fixtures, tiles, and floor damaged by a hurricane and that did not involve plumbing work. The Respondent also testified that he did not employ the services of a licensed plumber for any of the work in the October contract because none of it involved plumbing, but merely construction and replacement of fixtures, which tends to support the Respondent's account of the scope of work to be performed and is in accord with the plain language of the October contract. *See* CL Ex. 1.

Additionally, the Respondent and his witnesses testified that since the project involved replacement of an existing, working bathroom, neither Respondent nor any member of his firm had any reason to believe there was an existing problem regarding the toilet or that the raised platform did not provide the necessary gravitational forces to allow proper evacuation of sewage from the sewage lines connected to the toilet. These assertions were not contravened on the record before me.

Further support for these assertions can be found in the Claimants' testimony that they were not experiencing any water leaks in their basement bathroom prior to the October contract and that the basement was finished with fixtures, including a sink, bathtub and toilet, on a raised platform. It is reasonable then to infer that the Respondent, performing work to an existing functioning bathroom without any reported leaks, could conclude that the system already in place to address the evacuation of sewage from the sewage lines connected to the toilet must be sufficient.

Finally, one of the Respondent's witnesses, Frank Piroleau, testified, without contravention, that he installed a new toilet on the rebuilt raised platform and tested it several times by flushing it and did not see any evidence of water leakage coming from the toilet. As this testimony is unrefuted and credible, I find it as an established fact on the record before me which demonstrates that testing was performed after installation and that testing revealed no evidence of leakage. No party has established or even suggested that the testing performed by the Respondent or his employees, such as Mr. Piroleau, was inadequate, insufficient or improper.

I conclude, based on the record before me, that the Respondent's unequivocal, wholly unrefuted factual assertions, a number of which are supported by the Claimants' own account and that of the Respondent's witnesses, are credible and supported by the record. Further, as discussed above, there were also certain inconsistencies in the Claimants' factual account that limits the weight I can give their testimony. More than the weight of any of these credibility factors, however, in the absence of an expert witness who provided persuasive evidence that installation of a sewer injector was necessary, I cannot so conclude, despite the Claimants' heartfelt and genuine but unsupported belief that it is. While the Claimants were uniquely sympathetic and many of their arguments certainly emotionally although not legally compelling,

this cannot influence my decision and, as in all cases, I must neutrally apply the law and regulations to the facts of the instant matter. COMAR 28.02.01.11A(1).

While I find that the Respondent was a licensed home improvement contractor at the time he entered into the contract for home improvement work with the Claimants, I cannot find, based on the record before me, that the Respondent performed unworkmanlike, inadequate or incomplete home improvements by failing to install a sewer injector in the basement bathroom of the Claimant's home, and thus I conclude that the Claimants' case fails and they are not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have failed to prove that they sustained an actual and compensable loss 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 Guarantee Fund deny the Claimants' claim; and

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

Signature on File

October 6, 2015
Date Decision Issued

Steven V. Adler
Administrative Law Judge

SVA/da
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