

IN THE MATTER OF THE CLAIM	* BEFORE MARC NACHMAN,
OF RONNIE LOUIA,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH Case No.: DLR-HIC-02-15-03728
FOR THE ALLEGED ACTS OR	* MHIC No.: 14 (75) 465
OMISSIONS OF JUSTIN K. MYERS,	*
T/A MYERS BUILDERS AND	*
DESIGN, LLC,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On January 14, 2014, Ronnie Louia (Claimant) filed a claim (Claim) with the Maryland Home Improvement Guaranty Fund (Fund) for reimbursement of \$7,300.00 in alleged actual losses suffered as a result of a home improvement contract with Justin K. Myers, T/A Myers Builders and Design, LLC (Respondent).

I held a hearing on June 1, 2015 at the Wheaton office of the Office of Administrative Hearings (OAH). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant

represented himself. The Respondent failed to appear. Hope Sachs, 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 Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant 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 exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Claimant's contract with Respondent, with proof of payment attached
- Clmt. Ex. 2 - A through M – Photographs
- Clmt. Ex. 3 - Contract from On Top Home Improvement, Inc. (On Top), with proof of payment attached

No exhibits were submitted on behalf of the Respondent, who failed to appear at the hearing.

The following exhibits were admitted into evidence on behalf of the Fund:

- GF Ex. 1 - Notice of Hearing, dated April 2, 2015; Hearing Order dated January 27, 2015
- GF Ex. 2 - Licensing history for the Respondent
- GF Ex. 3 - Claim Form received January 14, 2014, with Maryland Home Improvement Commission (MHIC) correspondence to the Respondent dated March 28, 2014

Testimony

The Claimant testified on his own behalf and presented the testimony of Dan R. Cox, President, On Top, who was accepted as an expert in roofing.

No other witnesses testified.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 4617861.
2. On April 11, 2013, the Claimant and the Respondent entered into a contract to do the following home improvement work at the Claimant's house:¹

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- 1) Remove the existing roof;
 - 2) Remove two sheets of damaged plywood over the carport area;
 - 3) Install new tar paper on top of the plywood sub roof;
 - 4) Install new drop edge flashing around the perimeter of the roof;
 - 5) Install weather shield rolled flashing in valleys of the roof where it would be subject to water accumulation;
 - 6) Install new roof (three tab composition shingle) with twenty-five year warranty;
 - 7) Remove old antennas; and
 - 8) Remove all debris from the job site (CL Ex. 1).
3. The contract did not contain the start or end date of the project or the Respondent's MHIC license number. The original agreed-upon contract price was \$7,300.00 (Cl. Ex. 1).

¹ The scope of the work was taken almost verbatim from the contract, although grammatical errors were corrected for the purposes of rendering a clearer decision.

4. On April 12 and 24, 2013, the Claimant paid the Respondent \$4,000.00 and 3,300.00, respectively (Cl. Ex. 1).

5. The Respondent performed work on the property, but did so using substandard materials and improper procedures, and used caulking where it was not supposed to be used. The Respondent generally performed his work in an unworkmanlike, inadequate, or incomplete manner.

6. The Claimant called the Respondent to correct his work. The Respondent told the Claimant that he could not afford to make the repairs without additional compensation, which the Claimant rejected. The Respondent eventually did not return the Claimant's telephone calls.

7. No part of the Respondent's work could have been corrected without requiring another contractor (On Top) to do the following work:

- 1) Removing the roof installed by the Respondent, and inspecting the area under the shingles for water damage and dry rot;
- 2) Preparing a proper underlayment;
- 3) Installing proper flashing;
- 4) Installing a new ridge vent; and
- 5) Removing the debris (CL Ex. # 3).

8. None of the work performed by the Respondent could be salvaged.

9. The Claimant gave the Respondent an opportunity to correct his defective work.

10. The Respondent did not make any reasonable efforts to correct his defective work.

11. All of the work performed by On Top was to correct the Respondent's unworkmanlike, inadequate, and incomplete home improvements and was within the scope of the Respondent's contract.

12. On Top charged the Claimant \$8,400.00 for the new roof, with additional charges of \$240.00 for four sheets of plywood at \$60.00 per sheet, and \$210.00 for 60 feet of 1" x 6" wood at \$3.50 per foot.

13. The Claimant paid On Top a total of \$8,850.00.

DISCUSSION

I. Notice of the Hearing

A threshold question in this case is whether the Respondent received timely notice of the hearing. If the Respondent was properly notified of the hearing, the case could proceed in his absence.

A Notice of Hearing was mailed to the Respondent by certified and regular mail on April 2, 2015, to the address that the MHIC had on record for the Respondent (GF. Ex. 2). The certified mail return receipt card was signed by Adam Myers on the Respondent's behalf. Additionally, the Notice of Hearing mailed by regular mail was not returned to the OAH, indicating its delivery to the Respondent.

I find that the OAH Notice of Hearing sent to the Respondent's address of record was reasonably calculated to give the Respondent notice of this hearing. The Respondent was given adequate notice to appear at the hearing. Accordingly, I considered that the Respondent failed to appear and the case properly could proceed in his absence, after adequate notice was given. *See Border v. Grooms*, 267 Md. 100, 104 (1972) (the "mailbox rule"). *See also*, Md. Code Ann., Bus. Reg. §§ 8-312(h) (2004).

II. The Applicable MHIC Law

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). For the following reasons, I find that the Claimant has proven eligibility for compensation.

III. Unworkmanlike, Inadequate or Incomplete Home Improvements

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Secondly, the home improvement work that the Respondent performed was unworkmanlike, inadequate or incompletely performed. The photographs of the roof, taken by Mr. Cox, the Claimant’s expert witness,² show work that was performed in an obviously poor and sloppy manner. Mr. Cox clearly and professionally described the deficits in the Respondent’s work. There was caulk in the roof valleys which is unworkmanlike, because Mr. Cox explained that caulking is never used directly on a roof to waterproof it (Cl. Ex. 2 A and B) – much of the waterproofing comes from the underlayment which was incorrectly installed. The shingles were poorly spaced, which could possibly lead to water damage below; even if only cosmetic, the size of the gaps were not within industry standards (Cl. Ex. 2D). The flashing showed signs of caulk and improper installation; smeared caulk appeared on the roof where it was not supposed to be located (Cl. Ex. 2E, F and J). The ridge cap was not square with the house, which Mr. Cox described as unworkmanlike (CL Ex. 2 K and L). There was improper flashing on the pipe collars, which also showed signs of caulk improperly used on the roof (Cl. Ex. 2G).³ Patches appeared to be used on the roof in place of proper shingle and flashing installation; the nail heads went through

² Mr. Cox has been in the roofing trade for 32 years, as an installer, inspector and estimator. His testimony was very professional, focused and understandable.

³ Mr. Cox testified very knowledgeably, professionally and in a reserved manner. When asked about this photograph, however, he exclaimed that “whoever installed it did not know what they were doing.” After explaining the nature of flashing and ice damming, and the improper use of caulking to protect a roof, I agree with his assessment of the Respondent’s inadequate skill level.

the exposed flashing and the shingles, adversely affecting the flashing's waterproof seal (Cl. Ex. 2 C, H, I, J).⁴ Mr. Cox's knowledge came through his initial inspection of the property (which he photographed) and what was observed when his company removed the roofing installed by the Respondent.

There is little doubt from the pictures and Mr. Cox's detailed description that the Respondent performed the home improvement at the Claimant's house in an unworkmanlike, inadequate or incomplete manner.

IV. Good Faith Efforts to Resolve the Claim

The third and remaining question is whether the Claimant failed to give the Respondent an opportunity to cure his poor workmanship. Maryland law provides that a claim against the Fund may be denied if the claimant has "unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann. Bus. Reg. § 8-405(d) (2015).

Evidence of the Respondent's lack of good faith in resolving the claim and the adverse interaction between the parties came solely from the Claimant's testimony, as the Respondent failed to appear at the hearing. The Claimant confuses the order of some events, but in the final analysis, the Respondent did not make a good faith effort to resolve the claim. Accordingly, the Claimant did not unreasonably reject any of the Respondent's efforts to resolve the claim.

The Claimant testified that he contacted the Respondent after the first rain, as the carport roof the Respondent installed began to leak "like a sieve." The Respondent came back to the house and walked around it with the Claimant. The Respondent admitted that he would have done the work "differently," but that he could not "afford to [correct] it for nothing." The

⁴ The Fund raised the issue of whether the plywood replaced by the Respondent was included within the On Top contract. Even if the Claimant's house required additional plywood, the Fund award in this matter is greater than the actual loss cognizable under the MHIC regulations and authorizing statutes (see footnote 6, below).

Respondent told the Claimant that he would “try” to do “something,” but no corrective action was ever taken.

Frustrated with the Respondent’s inability to resolve the matter without additional cost, the Claimant asked the Respondent to return his money, to which the Respondent replied it would “bankrupt his company.” The Respondent did not come to the house to address subsequent leaks. The Claimant testified that he called the Respondent a few more times, but that the Respondent never returned his calls.⁵

Seeking additional funds from the Claimant to correct a clearly defective home improvement does not establish a good faith attempt to resolve the claim. Even if it were a good faith effort, the Respondent never followed up on his promise to do “something.”

The Claimant has not “unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann. Bus. Reg. § 8-405(d) (2015). I thus find that the Claimant is eligible for compensation from the Fund.

V. Fund Award

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest. COMAR 09.08.03.03B(1). The MHIC regulations provide three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

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

⁵ Although the Claimant testified that the Respondent told the Claimant’s wife that he was not coming back after he completed the work, it was unclear when that discussion occurred.

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.

COMAR 09.08.03.03B(3)(c).

Pursuant to the Business Regulation Article, 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. Bus. Reg. § 8-405(e)(1), (5) (2015).

The Claimant paid \$7,300.00 to the Respondent to install a new roof on his house; he paid On Top \$8,850.00 to correct the Respondent's unworkmanlike, inadequate, and incomplete roofing.⁶ Md. Code Ann., Bus. Reg. § 8-405 (e)(1), (5) (2015). After adding the amount the Claimant paid the Respondent to the amount he paid On Top to correct the work ($\$7,300.00 + \$8,850.00 = \$16,150.00$), and subtracting the original contract price ($\$7,300.00$), the Claimant is limited to reimbursement in the amount of \$7,300.00, the actual amount he paid the Respondent for work within the scope of the Respondent's contract with the Claimant.⁷ Md. Code Ann., Bus. Reg. § 8-405 (e)(5) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$7,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$7,300.00; and

⁶ There was some evidence that the Claimant paid additional amounts for plywood underlayment, but he did not present any evidence of the amount or the circumstances under which it was purchased. Moreover, the amount paid by or on behalf of the Claimant to the Respondent limits the Fund award.

⁷ See footnote 6.

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁸ and

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

Signature on File

August 24, 2015
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/dlm
#157801

⁸ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 5th day of October, 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION