

**IN THE MATTER OF THE CLAIM
OF LISA HENSLEY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF PHILIP RYAN,
T/A JR DESIGN BUILD,
INCORPORATED**

*** BEFORE SYEETAH HAMPTON-EL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-30025
* MHIC No.: 18 (90) 507**

RESPONDENT

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On January 30, 2018, Lisa Hensley (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$9,890.00 in actual losses allegedly suffered as a result of a home improvement contract with Philip Ryan, trading as JR Design Build, Incorporated (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On September 19, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 22, 2019 at OAH located in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented herself. Clark Adams, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent(s)' acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Letter from the MHIC to the Respondent with MHIC Claim attached, dated January 30, 2018
- Fund Ex. 2 - DLR Licensing information for the Respondent, dated January 22, 2019
- Fund Ex. 3 - Notice of Hearing, dated October 22, 2018

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

- Clmt. Ex. 1 - Twenty-two color pictures
- Clmt. Ex. 2 - James Hardie - Hardie Plank (Hardie) Siding Installation Requirements, effective date May 2016
- Clmt. Ex. 3 - Proposal from Dorcus Construction Company (Dorcus), dated April 5, 2018

- Clmt. Ex. 4 - MHIC Complainant form and the following attachments:
- Proposal from the Respondent, dated October 6, 2016
 - Copies of checks dated October 8, 2016 and December 22, 2016
 - Invoice to the Claimant from the Respondent, dated December 8, 2016
 - Email communications between the Claimant and the Respondent, dated December 15, 2016 through March 22, 2017
 - Text messages between the Claimant and the Respondent, undated
 - Eighteen color pictures, undated
- Clmt. Ex. 5 - Email communications between the Claimant and the Respondent, dated August 1, 2017 through July 18, 2017
- Clmt. Ex. 6 - Settlement Offer from the Respondent to the Claimant, dated July 20, 2017
- Clmt. Ex. 7 - Letter from the Respondent to the Claimant, dated July 14, 2017
- Clmt. Ex. 8 - Letter from the Claimant to MHIC, undated
- Clmt. Ex. 9 - Letter from the Claimant to the Respondent, undated
- Clmt. Ex. 10- Color Picture

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

- Resp. Ex. 1 - Estimate from Corkum Craftsman & Construction, Incorporated (Corkum), (pages one of three), undated
- Resp. Ex. 2 - Proposal from the Respondent, dated October 6, 2016
- Resp. Ex. 3 - Residential drawings created by the Respondent, dated October 11, 2016
- Resp. Ex. 4 - Color Picture of Ceiling
- Resp. Ex. 5 - Two Color Pictures of Pine Needles and Clogged Gutter
- Resp. Ex. 6 - Color Picture of Scuffed Shower Basin
- Resp. Ex. 7 - Color Picture of Shower
- Resp. Ex. 8 - Two Color Pictures of Stackable Washer and Dryer and Bathroom
- Resp. Ex. 9 - Color Picture of Sink
- Resp. Ex. 10 - Color Picture of Back of House

Resp. Ex. 11 - Pricing Drawings

Resp. Ex. 12 - Letter from the Respondent to the Claimant, dated July 14, 2017

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not present any witnesses.

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 5150365.

2. On October 6, 2016, the Claimant and the Respondent entered into a contract to enclose the side covered porch and install a bathroom and laundry room (Contract) at the Claimant's residence. The Claimant and Respondent did not sign the Contract. The Contract did not indicate when the work would begin or the completion date.

3. The original agreed-upon Contract price was \$ 29,750.00. For the stated price, the Respondent agreed to:

- Enclose the side covered porch and install siding;
- Perform Electrical work and install washer/dryer;
- Perform Electrical work and install new light in bathroom and exhaust fan;
- Install bathroom fixtures; shower, toilet, wall cabinet, and pedestal sink;
- Install floor tile, wall tile, shower bench, and preformed shower niche;
- Use Sherwin Williams paint; and
- Heating, Ventilation, Air Conditioning (HVAC) work to install one baseboard electric heater, wall mount, and exhaust for clothes dryer.

4. On October 8, 2016, the Claimant paid the Respondent \$ 20,000.00. On December 12, 2016, the Claimant paid the Respondent the final Contract payment of \$11,974.92, for a total contract price of \$31,974.92. The Claimant paid the Contract in full. The final \$11,974.92 payment in December included additional costs of \$500.00 for a mirror, \$200.00 permit fee, \$250.00 box beam removal, \$280.00 vanity cabinet, \$737.00 quartz top with sink/shower sill, \$1,575.00 extra tile cost, \$250.00 kitchen door, and credits of \$300.00 for pedestal sink, \$75.00 light fixture allowance, \$60.04 for toilet, \$300.00 for handheld shower, and \$500.00 payment to a tile supplier.

5. On March 19, 2017, after a flood caused by a snowstorm, the Claimant noticed water on the floor leaking from the window and ceiling in the downstairs bathroom, and bubbling paint. In addition, the Claimant noticed the shower glass door no longer completely closed. Additional damage included falling grout, scuffed shower basin, and bulging tiles.

6. After the flood, the Respondent recaulked the leaking window, patched the ceiling, and replaced a plumbing boot which stopped the leaking roof. The Respondent inspected the roof and located pine needles in the gutter. The Respondent suggested Miracle Method to fix the scuffed shower basin.

7. In March 2017, the Claimant observed additional issues with the Respondent's work including:

- Hardie Plank Siding installation including proper priming and painting according to manufacturer standards;
- Shower door did not close and left a small gap;
- Tiles popping off wall;
- Within the basement leading into laundry room, the ceiling remained open and not patched.

8. Between March 2017 and April 2017, the Claimant emailed the Respondent requesting repair of the identified areas of concern. The Respondent responded and provided corrective repairs or recommendations regarding the following:

- Bubbling Paint
- Investigated the roof and located the pine needles in the gutter
- Had a new plumbing boot installed to address leaking from ceiling
- Patched the ceiling within the bathroom
- Offered company information to address scuff in shower basin
- Had a glass installer re-adjust the shower door.
- The Respondent inspected the shower door and determined the door closed within industry standards

9. In May 2017, the Respondent last performed work at the Claimant's residence.

10. On July 14, 2017, the Respondent sent a letter to the Claimant challenging the claims and listing what further corrections he was willing to make. The Respondent offered to do the following:

- Meet with the Claimant to look at window leakage;
- Have the glass subcontractor attempt to adjust the shower door again;
- Re-point and re-paint the ceiling under specific work conditions detailed within the letter;
- Pay for Finer Finish to touch up the scuffed shower basin;
- Paint the basement ceiling in the area with holes from the drilling of new pipes.

11. The Claimant obtained an estimate¹ from Corkum Craftsman & Construction, Incorporated (Corkum). The estimate was to repair the bathroom work performed by the Respondent. Jim Corkum, the owner of Corkum, is the Claimant's ex-husband.

12. On April 5, 2018, the Claimant obtained an estimate for the amount of \$10,347.00 from Dorcus² to correct the water damage repairs and renovation of the bathroom. The estimate did not include any repairs to the roof or siding.

13. In addition, the Dorcus estimate was to fix identified defects including:

- Water damaged walls;
- Shower door gap;
- Bulging or popping tiles;
- Shower seat pitch incorrect causing water to puddle on the bench instead of running off;
- Scuffed shower basin;
- Falling grout; and
- Leaking shower.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true."

¹ The estimate admitted into evidence as Respondent Exhibit 1, does not contain a date or full contract price. The admitted document was page one of three.

² The Fund did not produce licensing information for Dorcus. On the estimate dated April 5, 2018, Dorcus lists MHIC number 52003

Coleman v. Anne Arundel Cty. Police Dep't, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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)³; *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant testified she contracted with the Respondent to enclose the covered side porch area and install a bathroom and laundry area. On October 6, 2016, the Claimant verbally agreed to pay the Respondent \$29,750.00 to perform the terms of the Contract. The price increased by \$2,224.92 to \$31,974.92. The additional monies included agreed-upon costs and credits to perform the Contract as agreed. On October 8, 2016, the Claimant paid the Respondent \$20,000.00. On December 22, 2016, the Claimant paid the Respondent the remaining balance of \$11,974.92. The Claimant paid the Contract in full several months before problems were identified after a March 2017 snowstorm. The Claimant and the Respondent agree a snowstorm occurred in March 2017.

As a result of the snowstorm, the Claimant testified several problems with the remodel were identified. The Claimant noticed water on the floor of the downstairs bathroom which was leaking from the floor. The Claimant notified the Respondent and ultimately acknowledged an issue with the plumbing subcontractor and replaced the plumbing boot. The Claimant also observed bubbling paint, leaking water from the window, leaking from the ceiling and the

³ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

shower door no longer completely closed. The Claimant testified she notified the Respondent and took multiple pictures of the bathroom problems. The Claimant testified the Respondent caulked the leaking window and patched the leaking ceiling in the bathroom.

The Claimant continued to experience problems with the work performed by the Respondent. The Respondent last performed any corrective repairs in May 2017. After this date, the Claimant testified she continued to experience problems in the enclosed porch and bathroom. Specifically, the Claimant testified she notified the Respondent of the following issues: shower door gap, bulging tiles, shower seat bench tilt caused puddling on the bench, scratched shower basin, falling grout, leaking shower, and the basement ceiling left open after connecting pipes for the laundry washer/dryer. As a result of the Respondent's failure to respond or correct the issues, the Claimant obtained a proposal from Dorcus Construction.

Dorcus Construction came to the property and surveyed the enclosed porch and bathroom. On April 5, 2018, Dorcus created a proposal to repair the bathroom work performed by the Respondent. The Dorcus proposal estimated the cost at \$10,347.00 to demolish the bathroom and start over but saving as many items to reuse in the new bathroom. Per the Dorcus proposal, they agreed to save and re-install the shower door, toilet, and shower faucet. The Claimant testified she was unhappy with the siding installed by the Respondent; however, the Dorcus proposal did not cover siding.

The Respondent testified he was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Respondent testified he is the President of JR Design Build and has over 25 years of experience in the area of design and auto computer-aided design (CAD).

The Respondent did not dispute being paid in full which included the full contract price and additional charges totaling \$31,974.92. The Respondent testified he created a site plan and

drawing of the enclosed porch for “gratis⁴.” While testifying, the Respondent used a timeline to recall dates. The Respondent testified he substantially completed the work as the project passed inspection and he received a certificate of occupancy on December 21, 2018. The Respondent testified he furnished and installed the exhaust fan. In addition, he changed the cabinet sink to a sink with a culture stone finish.

The Respondent testified the light fixtures weren’t installed until April 13, 2017 because the Claimant provided the fixtures on April 12, 2017. In addition, he installed the towel bars sometime after completion.

The Respondent testified after learning of the leak in March 2017, he promptly responded to the Claimant’s property to inspect and address repairs. The Respondent acknowledged receiving text messages and pictures from the Claimant describing the damaged areas such as the bubbling paint, plumbing boot correction, scuffed shower basin and shower door gap. The Respondent testified although he received the text messages and emails, he never was provided a punch out list which included other areas of concern.

Based on the text messages and emails, the Respondent testified he made repairs including changing the plumbing boot, inspected the shower door and determined the door opened and closed within industry standards. The Respondent also offered a solution to the scuffed shower basin. He acknowledged the subcontractor wore booties and therefore is unaware of the cause. At his expense, the Respondent suggested the Claimant contact Miracle Method, a company to airbrush the shower basin. However, the Claimant decided against Miracle Method as she testified about a previous bad experience with the company. The Claimant suggested another company, but per the testimony, work never progressed with the second company.

⁴ Without charge

The Respondent testified the original contract covered installation of a new stackable washer/dryer and movement of the old washer/dryer to the basement. However, the Respondent testified the contract did not extend to patching the basement after drilling for drains and pipes to install the washer/dryer upstairs. The Respondent testified the Claimant never told him about the shower seat, shower grout, or leaking shower.

Regarding the siding, the Respondent testified he installed the siding on two of the three sides of the porch. He testified he used Tyvek to wrap the house and added flashing to the bottom. Further, the Respondent testified the siding was primed in the factory and he painted the siding within the required 180 days.

While the Respondent agreed the snowstorm caused some water damage, the Respondent contested the cause of the additional leaking under the shower. The Respondent testified he observed the drywall above the shower was disturbed which led him to believe the leak was caused by a roofing issue. The Respondent testified the additional water leaking was caused by the Claimant's failure to remove pine needles from the gutter causing the water from the snowstorm to be forced inside the structure.

The Respondent disagreed with the estimates presented by the Claimant's ex-husband, Jim Corkum of Corkum Construction and Dorcus Construction. The Respondent disagreed with the total demolition of the bathroom as he believed the bathroom was completed in a workmanlike manner.

Both the Claimant and Respondent agreed the March 2017 snowstorm caused some water damage within the new bathroom. The main disagreement was the cause of the water intrusion and whether it was due to clogged gutters or due to the unworkmanlike conduct of the Respondent. The Claimant provided credible testimony, albeit a bit disorganized, regarding the manner of notifying the Respondent of the unresolved issues at the property. The Claimant

presented several pages of emails and pictures she testified were sent to the Respondent, but she never provided a comprehensive list of all outstanding issues. The Claimant's testimony regarding the problems was generally clear and understandable. While not her intention, the Claimant ultimately acknowledged the Respondent's completion of the contract and no issues were noticed or considered until the snowstorm.

The Respondent also provided credible testimony regarding what work he completed and the quality of the work performed. The Respondent provided credible testimony regarding the products used to complete the project, such as use of the Hardie Plank, as this was a product he previously used in other projects.

However, the Respondent's testimony regarding the basement and the contract not extending to cover the open holes in the basement ceiling after new drains and pipes were connect was troubling. I find it hard to believe any contractor would believe it acceptable practice to install a new washer/dryer, drill to add new pipes, but not patch the holes created. In fact, in reading the actual contract there is a section entitled "Exclusions," which specifies exclusions. Patch work for new holes created is not listed as an exclusion within the following:

EXCLUSIONS:

Architect, Engineer, Surveyor, Excavation.

Rotten wood replacement is not a part of the scope of this proposal. Any rotten wood will be replaced at additional cost, to be approved in advance.

Replacement of existing box beam or any trim around the porch is not part of the scope of this proposal.

(Respondent's Exhibit 2)

While I agree, the Claimant never provided a punch list of areas of concern, I do not believe the Respondent was not aware of all the concerns identified by the Claimant in her many emails and text messages. I believe the Respondent was unable to keep up with the various forms of notification of the issues and focused on the issues he could remember. For example, the Claimant notified the Respondent of issues with the shower door, but I find it unreasonable

that she would not have also mentioned the water from the shower and falling grout. The Claimant and the Respondent admitted a letter from the Respondent dated July 14, 2017 detailing the areas of concern. The letter further proves the Respondent was aware of the issues and outlined five corrective measures he would perform.

Based on the evidence as presented, I find the Respondent performed unworkmanlike, inadequate or incomplete home improvements. As a result, the Claimant had to seek another contractor to fix the multitude of issues identified which ultimately resulted in seeking estimates and learning of the need to totally demolish the bathroom to correct the problems.

I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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).

In this case, as a result of the incomplete and unworkmanlike work of the Respondent, the Claimant sought estimates from two contractors. The Claimant provided estimates from Corkum Contractors for \$5,100.00, but the estimate did not provide all the pages to get a clear picture of what work the estimate covered. The second estimate was from Dorcus Construction for \$10,347.00. This estimate required full demolition of the bathroom with the intent to reuse a few of the fixtures to save money. Both estimates did not include roofing repairs as the original contract did not contain roofing repairs. Therefore, the Claimant is not entitled to recover for any alleged roofing repairs.

Applying the formula as follows:

Original Contract Cost:	\$31,974.92
Dorcus Estimate Cost:	<u>\$10,347.00</u>
Total Home Improvement Cost:	\$42,321.92
Less <u>Original Contract:</u>	<u>\$31,974.92</u>
Total Actual Loss:	\$10,347.00

The Claimant has an actual loss of \$10,347.00. The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover her actual loss of \$10,347.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,347.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(C). I further conclude that the Claimant is entitled to recover that amount from the Fund. COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,347.00; and

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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

April 17, 2019
Date Decision Issued

Signature on File

Sygetah Hampton-EL
Sygetah Hampton-EL
Administrative Law Judge

SAH/ej
#179042

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 23rd day of May, 2019, 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.

Robert Altieri

Robert Altieri

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION