

IN THE MATTER OF THE CLAIM	* BEFORE DANIA AYOUBI,
OF DAWN PATCHEN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF PAUL CAIN,	*
T/A CAIN HOME IMPROVEMENT,	* OAH No.: LABOR-HIC-02-23-04887
RESPONDENT	* MHIC No.: 23 (75) 83

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On November 19, 2022, Dawn Patchen (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$6,367.07 for actual losses allegedly suffered as a result of a home improvement contract with Paul Cain, trading as Cain Home Improvement (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).² On January 5, 2023, the MHIC issued a Proposed Order in which the MHIC determined that the Claimant established a valid claim against the MHIC and

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

² All references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

that as a result of the Respondent's unworkmanlike, incomplete, or inadequate work under a home improvement contract, the Claimant sustained an actual loss of \$6,367.07.

Thereafter, a request for hearing was filed. Accordingly, on February 3, 2023, the MHIC issued a Hearing Order on the Claim and on February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 19, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 offered by the Claimant:

- Clmt. Ex. 1 - Photograph depicting shed roof, undated
- Clmt. Ex. 2 - Photograph depicting close-up view of shed roof, undated
- Clmt. Ex. 3 - Photograph depicting missing shingles from shed roof, undated
- Clmt. Ex. 4 - Claimant's narrative, undated

Clmt. Ex. 5 - Estimate from Economy Restoration, October 7, 2022

Clmt. Ex. 6 - Photograph depicting Respondent's repair of shed roof, undated

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Photograph depicting installation of plywood at shed roof, undated

Resp. Ex. 2 - Email correspondence from the Respondent to the MHIC, September 13, 2022

Resp. Ex. 3 - Photograph depicting completed installation of shed roof, undated

Resp. Ex. 4 - Text message correspondence between the Claimant and the Respondent, April 13, 2022

Resp. Ex. 5 - Photograph depicting screenshot of Lowe's Home Improvement video, undated, with the following attachments:

- Photograph depicting screenshot of Lowe's Home Improvement video with caption, undated
- Diagram of various flashing installations, undated

Resp. Ex. 6 - Estimate from Cain Home Improvement, October 20, 2021, with the following attachment:

- Invoice from Cain Home Improvement, November 5, 2021

Resp. Ex. 7 - Photograph depicting Respondent's repair of shed roof, undated

Resp. Ex. 8 - MHIC's Proposed Order, January 5, 2023

Resp. Ex. 9-1 - Photograph depicting close-up view of interior shed roof, undated

Resp. Ex. 9-2 - Photograph depicting left side of interior shed roof, undated

Resp. Ex. 9-3 - Photograph depicting right side of interior shed roof, undated

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Correspondence from the MHIC to the Respondent, December 22, 2022, with the following attachment:

- Home Improvement Claim Form, received November 19, 2022

Fund Ex. 2 - Hearing Order, February 3, 2023

Fund Ex. 3 - Notice of Remote Hearing, March 9, 2023

Fund Ex. 4 - Respondent's MHIC licensing information, April 17, 2023

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund presented the testimony of the Claimant.

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 120185.
2. On October 30, 2021, the Respondent provided the Claimant an estimate to rebuild a barn-style roof of an existing exterior shed at the Claimant's home.
3. On or about October 30, 2021, the Claimant and the Respondent entered into a contract for the Respondent to perform the work as set forth in the estimate (Contract). The original agreed-upon Contract price was \$1,200.00 for a total of twenty hours of labor at \$60.00 per hour.
4. The Contract included labor only to: 1) remove the existing shingles for \$480.00 (estimated eight hours of work); 2) remove damaged wood (not including joists) only from affected areas and install new plywood for \$240.00 (estimated four hours of work); and 3) install paper and new shingles for \$480.00 (estimated eight hours of work).
5. Because the Claimant sought to keep costs low, the Contract only contemplated removal and replacement of the damaged wood on the roof.
6. The Claimant supplied and separately paid for all necessary materials.
7. On November 1, 2021, the Respondent began work pursuant to the Contract. He completed the work on November 5, 2021. Because the Respondent required a total of

thirty-one hours to complete the work and not the twenty hours that he initially estimated, he invoiced the Claimant for \$1,860.00 plus \$7.07 for materials, for a total of \$1,867.07, which the Claimant paid by check on or around November 6, 2021. The additional work performed included removing and replacing additional areas of damaged wood at the roof and trim that had rotted, painting the wood trim, and installing a drip edge. At the completion of the work, the shingles at the roof ridge did not lay flat or follow the curvature of the barn-style ridge; instead, they jutted out horizontally and overhung at the ridge by approximately three to four inches.

8. During the time the Respondent performed and completed the work, the Claimant was sick with COVID-19 and did not personally inspect the work.

9. On December 7, 2021, after noticing that several shingles were missing from the shed roof after a windstorm, the Claimant reached out to inform the Respondent, who indicated that he would return to repair the missing shingles. On December 11, 2021, the Respondent had still not repaired the missing shingles. The Claimant again reached out to him.

10. On December 16, 2021, the Respondent returned to the Claimant's home. The Respondent replaced the missing shingles and nailed down the overhanging shingles at the roof ridge.

11. Thereafter, the Claimant informed the Respondent that she was unsatisfied with the repair, specifically the exposed metal nail heads that she was concerned would rust and result in leaking. The Claimant suggested that the Respondent should have installed metal flashing on the roof. The Respondent indicated that the repair he performed was temporary, that he intended to conduct additional research, and that he would return in the spring.

12. On April 13, 2022, the Claimant reached out the Respondent to inquire when he would return to install flashing on the shed roof. The Respondent indicated that, though he did not believe flashing was required, he would conduct more research. Later that same day, he

informed the Claimant that he had done the job correctly and could use roofing caulk to cover the exposed nail heads. The Claimant declined.

13. On October 7, 2022, the Claimant obtained an estimate from Economy Restoration to replace the shed roof, including: removing the existing roof; replacing rotted wood; furnishing and installing shingles, including cap shingles on the roof ridge; furnishing and installing a drip edge; and furnishing and installing synthetic underlayment. Economy Restoration quoted the Claimant a total of \$3,500.00, including labor and materials:

14. Since the Respondent's repair of the shed roof on December 16, 2021, additional shingles have continued to come loose. As of April 2023, several shingles were missing from the shed roof.

DISCUSSION

Applicable Law

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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.

Burden of Proof

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov’t § 10-217; COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

Parties' Positions

The Claimant argued that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement by improperly installing a roof on an exterior shed at her home. The Claimant argued that the Respondent's work was improperly completed, as evidenced by the shingles blowing off shortly after completion of the job, and that the work should be guaranteed for some period of time.

The Respondent argued that he properly installed the shed roof and that, contrary to the Claimant's suggestion, flashing was not required. The Respondent explained that he returned to nail and replace missing shingles at the Claimant's request and that he also offered to caulk the exposed nails, but the Claimant instead pursued this claim. The Respondent further offered that he would have returned thereafter to address any other missing shingles had he been contacted.

Preliminarily, the Fund argued that the Contract does not comply with the writing and other requirements of section 8-501 of the Business Regulation Article. The Fund also explained that an estimate and an hourly rate are not definitive enough to constitute sufficient consideration. Further, the scope of the Contract was unclear as to which areas of wood on the roof would be replaced and which would remain.

Assuming that the Contract was valid, the Fund argued that the Respondent's work was inadequate. The Fund explained that at the completion of the Respondent's work, several shingles stuck out of place and within one-month, multiple shingles were ripped off and blown away. Even after the Respondent's repair, additional shingles continued to come loose. With respect to good faith efforts to resolve the claim, the Fund suggested that there was no clear evidence but that after April 2022, there were no further efforts by the Respondent to repair the shed roof.

Finally, the Fund argued that even if the Claimant were able to meet her burden to demonstrate that the Respondent's work was inadequate, she failed to establish the amount of actual loss that she sustained as a result. The Fund argued that the Claimant did not offer evidence to establish that the roof could not be repaired and instead must be fully replaced or that the work proposed by Economy Restoration would be to correct the Respondent's inadequate work. With respect to Economy Restoration's proposal to replace all wood, the Fund suggested that it was unclear whether that was to address preexisting water damage or water damage that may have been caused by the Respondent's inadequate work. Additionally, the Fund took issue with Economy Restoration's estimate including materials and labor whereas the Contract with the Respondent was for labor only.

Analysis

For the reasons stated below, I conclude that the Claimant met her burden to demonstrate that the Respondent performed unworkmanlike or inadequate home improvements and that she is therefore eligible for compensation from the Fund. Further, I recommend an award in the amount of the Claimant's actual loss as explained below.

No Statutory Bars to Recovery

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration.

Id. §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

Contract Was Valid

Preliminarily, the Fund argued that the Contract does not comply with the writing and other requirements of section 8-501 of the Business Regulation Article. Section 8-501(b) requires that each home improvement contract: “(1) be in writing and legible; (2) describe clearly each document that it incorporates; and (3) be signed by each party to the home improvement contract.” *Id.* § 8-501(b) (Supp. 2022). And section 8-501(c) sets forth several additional requirements. However, 8-501(a) clearly explains that “[a] home improvement contract that does not comply with this section is not invalid merely because of noncompliance.” *Id.* § 8-501(a) (Supp. 2022). Furthermore, section 8-101 defines a home improvement contract as “an oral or written agreement between a contractor and owner for the contractor to perform a home improvement.” *Id.* § 8-101(h) (Supp. 2022).

Therefore, even considered in isolation, the fact that the agreement entered into between the Claimant and the Respondent was oral and not in writing does not make the Contract invalid. As the Supreme Court of Maryland³ has explained, “[c]reation of a contract requires an offer by one party and acceptance by the other party. Acceptance of an offer is requisite to contract formation, and common to all manifestations of acceptance is a demonstration that the parties had an actual meeting of the minds regarding contract formation.” *Cochran v. Norkunas*, 398 Md. 1, 23 (2007) (internal citations omitted).

Here, it is clear that the Respondent offered to perform work to remove an existing roof and install a new roof on the exterior shed at the Claimant’s home, an offer which the Claimant

³ On December 14, 2022, the Court of Appeals of Maryland was renamed the Supreme Court of Maryland.

accepted. Additionally, the Respondent understood that the Claimant sought to keep costs low and agreed to only remove and replace the damaged wood on the roof. This record evinces a meeting of the minds between the Respondent and the Claimant regarding contract formation, including the terms and scope of the work. For these reasons, I conclude that the Contract was valid.

The Respondent Performed Unworkmanlike or Inadequate Home Improvements

The Respondent performed unworkmanlike or inadequate home improvements by improperly installing the shed roof. The Claimant suggested that the Respondent should have used flashing before installing the roof shingles. The Claimant offered no expert testimony to support that position. Nevertheless, even without an expert opinion, a review of the evidence presented demonstrates that the Claimant contracted with the Respondent to repair damaged wood and install new shingles on the exterior shed at her home. The Claimant was sick and unable to personally oversee the Respondent's work or monitor his progress.

At the completion of the job, the shingles at the barn-style ridge of the roof jutted out three to four inches. (Claimant's Ex. 1). The Respondent himself conceded that the shingles were inadequately installed and looked like "a bad haircut." The Respondent's explanation for the shingles failing to lay flat was the cold November weather. But even before warm weather arrived to test the Respondent's theory, shingles began falling from the roof, just a little more than one month after his completion of the work.

Though the Claimant did not produce any expert evidence as to why shingles began falling or what the proper installation should have looked like, she is not required to do so to meet her burden under the Business Regulation Article. That some shingles were jutting out at the completion of the work and other shingles began falling from the roof within approximately one month plainly support a finding, by a preponderance of the evidence, that the Respondent

performed unworkmanlike or inadequate home improvements by improperly installing the shed roof. Further, the Claimant testified that even after the Respondent's attempt to repair the roof, additional shingles have continued to fall off and that as of April 2023, several shingles were missing from the shed roof.

No Unreasonable Rejection of Good Faith Efforts to Resolve the Claim

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *See id.* § 8-405(d) (Supp. 2022). The Respondent's initial repair in December 2021 did not ultimately remedy the unworkmanlike or inadequate home improvements, as evidenced by the fact that shingles continued to fall from the roof thereafter. Additionally, the Respondent's offer to caulk the exposed nail heads in April 2022 failed to address the Claimant's concerns.

The record demonstrates that as soon as the Claimant noticed shingles missing from the roof in early December 2021, she notified the Respondent. Thereafter, on December 16, 2021, the Respondent returned to the Claimant's home to replace the missing shingles and nail down the shingles overhanging at the roof ridge. At the Claimant's continued suggestion that the Respondent use flashing in the roof installation, the Respondent agreed to research the matter further and return in the spring.

When the Claimant reached back out to the Respondent on April 13, 2022 to follow up, it was clear that the Respondent had not yet conducted that research. Later that same day, he responded to let the Claimant know that he had done the job correctly and could caulk the exposed nail heads, as he understood the Claimant's concern to be an aesthetic or cosmetic one. However, as the Claimant testified, her concerns regarding the exposed nail heads were related to the nail heads rusting, potentially resulting in leaking. Additionally, the Claimant testified that she did not want the roof repaired the way that the Respondent offered to repair it and that by

that point, after nearly six months, the interaction with the Respondent had gone on for too long; hence she indicated to the Respondent that she would have “someone else take care of it.”

(Resp. Ex. 4).

For the reasons stated above, I conclude that the Claimant is eligible for compensation from the Fund.

Amount of Actual Loss and Recovery

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) (Supp. 2022); 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.

The formulas are 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.

(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.

COMAR 09.08.03.03B(3)(a)-(c).

In some cases, a particular claim may require a unique measurement of actual loss. COMAR 09.08.03.03B(3). Here, although the Respondent did work according to the Contract and the Claimant has solicited another contractor to properly complete the work, the record is unclear regarding the extent to which Economy Restoration would repair poor work done by the Respondent under the Contract or, in addition, perform work outside the scope of the Contract. Additionally, the estimate provided by Economy Restoration includes both labor and materials whereas the Contract was for labor only. Accordingly, I take a unique measurement of the Claimant's actual loss in recommending an award in this case.

Under a home improvement contract for labor only where the work performed was unworkmanlike or inadequate, an appropriate measurement of the claimant's actual loss is equal to the amount paid for labor. Though inapplicable here, the second formula for actual loss under COMAR 09.08.03.03B(3)(b), which deducts the value of any materials or services, supports such an approach. In this case, the Claimant paid the Respondent a total of \$1,867.07, including \$1,860.00 for thirty-one hours of labor (at \$60.00 per hour) and \$7.07 for materials. Therefore, the Claimant's actual loss equals \$1,860.00.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁴ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$1,860.00.

⁴ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$1,860.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,860.00; 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.

July 11, 2023
Date Decision Issued

Dania Ayoubi

Dania Ayoubi
Administrative Law Judge

DLA/at
#206093

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

PROPOSED ORDER

WHEREFORE, this 21st day of August, 2023, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***