

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF ANDY CROSSLAND,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT,	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF MICHAEL	*
BRIDGMAN,	* OAH No.: DLR-HIC-02-15-07750
T/A PEAKE CONSTRUCTION	* MHIC No.: 14 (90) 352
GROUP LLC,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On June 5, 2014, Andy Crossland (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,660.00¹ in alleged actual losses suffered as a result of a home improvement contract with Michael Bridgman, trading as Peake Construction Group LLC (Respondent).

¹ The Claimant amended the amount of the claim to \$13,867.00 at the hearing.

I held a hearing on June 10, 2015 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant participated without representation. The Respondent did not appear for the hearing despite receiving proper notice. Kris King, 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 into evidence on the Claimant's behalf:

- Cl. Ex. 1. Contract, August 4, 2011.
- Cl. Ex. 2. Copies of two checks, January 24, 2012 and March 1, 2012.
- Cl. Ex. 3. Summary of Claims.
- Cl. Ex. 4. Report from Vannoy & Associates, Consulting Engineers, November 14, 2012.
- Cl. Ex. 5. Cost Summary; invoice from American Home Services, Inc., October 30, 2012; contract with Basement Waterproofing Nationwide, Inc., December 28, 2012; receipt from The Home Depot, February 15, 2013; estimate from Ferney Leal Handyman Services, April 16, 2013; invoice from True American Services LLC, January 30, 2014; estimate from Timur Construction Inc.; proposal from Energy Efficiency Experts LLC, November 14, 2014.

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1. Notice of Hearing, May 21, 2015.
- Fund Ex. 2. Notice of Hearing, April 2, 2015.
- Fund Ex. 3. Hearing Order, February 12, 2015.
- Fund Ex. 4. The Respondent's licensing history with the MHIC, June 8, 2015.
- Fund Ex. 5. Anne Arundel County Real Property Data Search showing the Respondent's residential address, May 20, 2015.
- Fund Ex. 6. Home Improvement Claim Form, received June 5, 2014.
- Fund Ex. 7. Letter from the MHIC to the Respondent, June 12, 2014.
- Fund Ex. 8. Letter from the Claimant to Mr. Escobar, undated.

Testimony

The Claimant testified in support of his claim.

The Fund presented no testimony.

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 01-98938.
2. On August 4, 2011, the Claimant and the Respondent entered into a contract to build a second story and addition to the Claimant's residence in Takoma Park, Maryland. The contract stated that work would begin on or around August 1, 2011 and would be completed on or around December 1, 2011.
3. The contract price was \$199,770.00.

4. The Respondent completed the addition and second story as called for in the contract, finishing the work in March 2012.
5. The Claimant paid the Respondent the full contract price.
6. In October of 2012, after Hurricane Sandy, the Claimant discovered that water had destroyed drywall and carpet in the finished basement of the home.
7. Water was entering the basement at the point where the foundation of the addition connected to the foundation of the existing house.
8. The Respondent had not tied the new foundation into the existing foundation properly, allowing groundwater to come through the foundation into the basement. The foundation had cracked as a result of the intrusion of water.
9. The Claimant paid American Home Services, Inc., \$1,500.00 for mold remediation in the basement, which included tearing out and discarding the ruined drywall and carpet.
10. The Claimant paid Basement Waterproofing Nationwide, Inc., \$5,880.00 to build a french drain in the basement and \$2,850.00 to repair the foundation.
11. The Claimant replaced ruined insulation in the basement walls at a cost of \$52.00 and spent \$100.00 on paint and supplies.
12. The Claimant paid Ferney Neal Handyman Services \$780.00 to replace the drywall in the basement.
13. One of the bathrooms that the Respondent built was above a closet in the existing home.
14. In January of 2014, the Claimant noticed that the ceiling of the closet was saturated with water.

15. The Respondent had installed a pipe to a toilet incorrectly, causing the toilet to leak into the floor and walls. The Respondent had also installed a pan under a washing machine without a seal in the pan's outlet, which also leaked.

16. The Claimant paid True American Services LLC \$145.00 to fix the leaks.

17. The Claimant paid Timur Construction Inc. \$380.00 to repair the drywall ruined by the leaks.

18. In the winter of 2014, a pipe froze in the right side of the addition, leading the Claimant to suspect inadequate insulation and/or sealing. He engaged Energy Efficiency Experts LLC to perform an energy audit of the addition.

19. The Respondent had failed to insulate the walls or seal the soffits on both sides of the addition, which allowed cold air to infiltrate the house.

20. Energy Efficiency Experts gave the Claimant an estimate of \$2,180.00 to seal the soffits. The Claimant has not yet had that work performed.

21. After discovering the water in the basement in 2012, the Claimant made many attempts, over several months, to contact the Respondent by telephone and e-mail. The Respondent did not return any of the Claimant's telephone calls or respond to the e-mails.

22. Discouraged by this lack of response, the Claimant did not try to contact the Respondent when the additional problems appeared.

23. The Respondent's business address on record with the MHIC was 480 Rugby Avenue, Suite 200, Bethesda, Maryland 20814.

24. The Respondent's MHIC license expired on January 14, 2013.

25. The Respondent's residential address is 2113 Bay Front Terrace, Annapolis, Maryland 21409.

26. On April 2, 2015, the OAH sent Notices of Hearing to the Respondent at 2113 Rayfront Terrace, Annapolis, Maryland 21409 by certified mail and by first class mail. The certified mail was returned unclaimed; the first class mail was not returned as undeliverable.

27. On May 21, 2015, the OAH sent Notices of Hearing to the Respondent at 2113 Bay Front Terrace, Annapolis, Maryland 21409 by certified mail and by first class mail. Neither Notice of Hearing was returned as undeliverable.

DISCUSSION

The Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article, entitled "Hearings," states, in pertinent part, as follows:

(a) Except as otherwise provided in § 10-226 of the State Government Article, before the Commission takes any final action under § 8-311 of this subtitle, or if requested under § 8-620(c) of this title, it shall give the person against whom the action is contemplated an opportunity for a hearing before the Commission or, as provided under § 8-313 of this subtitle, a hearing board.

(b) The Commission shall give notice and hold the hearing in accordance with Title 10, Subtitle 2 of the State Government Article.

....

(d) The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission.

....

(h) If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.

Md. Code Ann., Bus. Reg. § 8-312 (2015).

Although the above statute applies to disciplinary proceedings against licensees, the MHIC uses the same procedures for hearings involving claims against the Fund, such as this

case. These procedures ensure, as much as possible, that a contractor against whom a claim is filed is made aware of the date, time, and place of the hearing.

The notices in this case went to the Respondent's residential address, since he was no longer licensed by the MHIC and had no obligation to maintain a business address with the agency. A slightly incorrect residential address (2113 Rayfront Terrace) was initially provided by the MHIC, using information from the Respondent's licensing records. After the certified mail copy of the Notice of Hearing was returned unclaimed, the MHIC did a real property search of the State Department of Assessments and Taxation database and found the correct address of 2113 Bay Front Terrace, Annapolis, Maryland 21409. Certified and first class mail Notices of Hearing were sent to that address on May 21, 2015, and neither was returned undelivered by the U.S. Postal Service. From all of this information, I concluded that the Respondent received actual notice of the hearing and chose not to attend. Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h) (2015).

The Merits of the Case

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." Bus. Reg. § 8-401 (2015). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant and performed the work. Although his license expired on

January 14, 2013, the Respondent had completed the contract by that time and was thus licensed at all relevant times.

The Respondent performed unworkmanlike and inadequate home improvements. The Claimant discovered three significant problems with the Respondent's work within a little more than two years after the work was completed. First, the Respondent did not adequately tie the foundation for the new addition into the house's existing foundation, thus allowing groundwater to penetrate the foundation into the basement of the home.

The Claimant tried to recover from his homeowner's insurance carrier for the damage to the basement. He was unsuccessful in this attempt, but the insurance company hired Vannoy & Associates, Consulting Engineers, to inspect the basement and determine the cause of the damage. Vannoy & Associates found that groundwater was entering the basement at the point of the connection between the old and new foundations. Looking at the construction plans, the engineers saw that the Respondent had cut holes in the existing foundation, then directed concrete flow into the holes during the pour for the new foundation. This method did not result in a waterproof foundation at the point of the tie-in. Vannoy & Associates concluded that that the Respondent's design or construction was faulty and caused the intrusion of groundwater into the basement. (Cl. Ex. 4.) The intrusion cracked the foundation and ruined carpet and drywall in the basement.

The Claimant paid Basement Waterproofing Nationwide \$2,850.00 to repair the foundation. He was then faced with two expensive choices for dealing with the ongoing problem of water coming through the foundation: either dig up the yard to expose the foundation in the area of the leak and make the necessary repairs to the foundation itself, or deal with the water once it penetrated the foundation. The Claimant chose the second option after Basement

Waterproofing Nationwide told him it would be the less expensive solution. This involved digging up twenty-four linear feet of the concrete slab in the basement around the interior perimeter of the foundation and installing a french drain (gravel and pipes below grade) to carry the water away from the dwelling. Constructing the french drain cost \$5,880.00. The Claimant also paid \$832.00 to have the drywall and insulation in the basement replaced, plus \$100.00 for paint and supplies.

The second problem with the Respondent's work surfaced in January 2014. When adding the second story to the Claimant's house, the Respondent built a bathroom above an existing first-floor closet. The Claimant did not often examine the ceiling of this closet, but one day he noticed that the entire ceiling was saturated with water and about to collapse. The Claimant called True American Services LLC, who found that the Respondent had installed a pipe to a toilet too low, causing a leak in the connection. The Respondent had also put a pan under the washing machine without a seal, allowing another leak. Apparently, these leaks had been going on since the Respondent completed the work, and water had been infiltrating the ceiling and walls of the closet for many months.

The Claimant paid True American Services \$145.00 to fix the connection to the toilet. The leak in the pan under the washing machine was corrected by simply installing a washer in the outlet. The Claimant also paid \$380.00 to have the drywall in the closet replaced and painted.

The third deficiency with the Respondent's work was that he failed to insulate the walls or seal the soffits of the addition, as the Claimant learned when a pipe in the addition froze in the winter of 2014. The Claimant made a hole in one of the walls and found no insulation. He then engaged Energy Efficiency Experts LLC to conduct an energy audit, which he described as a large fan extracting air from the front door while smoke machines generated smoke around the

house. This showed where air (smoke) was being sucked into the house, which was all along the soffits under the roof of the addition. Energy Efficiency Experts gave the Claimant an estimate of \$2,180.00 to seal the soffits, but he has not yet had this work done.

Because of the above-described inadequacies in the Respondent's work, I find that the Claimant is eligible for compensation from the Fund. I now turn to the amount of the award 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's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). Because the Claimant has engaged other contractors to correct the Respondent's work, 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 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).

The Claimant and the Fund agreed that the Claimant is entitled to an award from the Fund, but disagreed over the amount of the award. The Fund argued that the Claimant's expenses for removal, replacement, and painting of the drywall in the basement and the closet are consequential damages, for which the Fund may not provide reimbursement. The Fund urged that the \$2,432.00 the Claimant spent to demolish and restore the damaged basement walls, as well as the \$380.00 for the drywall in the closet, should be excluded from the claim. The

Claimant countered that removal of the damaged drywall was necessary in both instances because the Respondent's faulty work could not be corrected with the drywall in place.

"Consequential damages" is not defined in the Business Regulation Article or in the regulations applicable to this hearing. An award from the Fund is not governed by principles of contract law or by the Uniform Commercial Code (the Commercial Law Article of the Annotated Code of Maryland), both of which contemplate awards of consequential damages if adequately proven and not prohibited by a provision in the relevant contract. *See* Md. Code Ann., Comm. Law § 2-715 (2013). Maryland cases interpreting awards of consequential damages have all been decided under contract law, breach of warranty law, and/or the Uniform Commercial Code. In *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277 (1974), the Court of Appeals explained entitlement to consequential damages as follows:

The allowance of incidental and consequential damages for breach of warranty finds its genesis in the rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854) that damages which a plaintiff may recover for breach of contract include both those which may fairly and reasonably be considered as arising naturally from the breach (general damages) and those which may reasonably be supposed to have been in the contemplation of both parties at the time of making of the contract (special damages). *See* *Taylor v. Equitable Trust Co.*, 269 Md. 149, 159, 304 A.2d 838, 844 (1973); *St. Paul at Chase v. Manufacturers Life Ins. Co.*, 262 Md. 192, 239-240, 278 A.2d 12, 35 (1971); *Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co. v. Messenger*, 181 Md. 295, 300-301, 29 A.2d 653, 656 (1943); 5 A. Corbin, *Contracts* s 1011, at 83-87, s 1101, at 543-46 (1964); 11 S. Williston, *Contracts* s 1393, at 448-53 (3d ed. 1968).

Restatement of *Contracts* s 330 (1932) provides:

'In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.'

Addressograph-Multigraph Corp. v. Zink, 273 Md. 277, 286 (1974) (footnote omitted).

In this administrative hearing, the “defendant” (to the extent that the designation is even applicable) is the Fund, but the contract was between the Claimant and the Respondent. Therefore, the question of what injuries might naturally follow a breach of the contract is not applicable in a claim against the Fund. The Claimant could correctly argue that water damage was a direct result of the Respondent’s inadequate work, but the MHIC has adopted regulations that provide that no consequential damages, even those directly caused by a breach of contract, may be reimbursed. Under this theory, the Fund’s argument is correct and the Claimant is not entitled to recover his expenses for removal and replacement of the drywall.

Accordingly, after excluding the amounts paid for consequential damages, the Claimant’s actual loss is as follows under COMAR 09.08.03.03B(3)(c):

\$5,880.00 to Basement Waterproofing Nationwide to build the french drain; plus
2,850.00 to Basement Waterproofing Nationwide to repair the foundation; plus
145.00 to True American Services to fix leaks; plus
+ 2,180.00 to seal the soffits; equals
\$11,055.00 paid or required to be paid to other contractors to repair poor work; plus
+\$199,770.00 paid under the original contract; equals
\$210,825.00 minus
-199,770.00 the original contract price; equals
\$11,055.00 actual loss.

Under 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 actual loss computed above is \$11,055.00, which does not exceed \$20,000.00 and is less than the amount paid to the Respondent. The Claimant is entitled to reimbursement from the Fund of his entire actual loss. Bus. Reg. § 8-405(e)(1) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$11,055.00 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 \$11,055.00; and

ORDER that the Respondent be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;² 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

Richard O'Connor
Administrative Law Judge

RO/ac
157680

² 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