

**IN THE MATTER OF THE CLAIM
OF MATTHEW AND CHRISTIN
JACKSON,
CLAIMANTS,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF LORI ROSE,
T/A PROFESSIONAL DECK CARE,
RESPONDENT**

*** BEFORE LAURIE BENNETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-15-03919
* MHIC No.: 15 (90) 390
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 15, 2014, Matthew Jackson, on behalf of him and his wife, Christine Jackson (the Claimants), filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC) Guaranty Fund (the Fund) for reimbursement of alleged actual losses suffered as a result of a home improvement contract with Lori Rose, t/a trading as Professional Deck Care (the Respondent).

On June 9, 2015, I held a hearing in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Claimant Matthew Jackson represented the Claimants. The Respondent represented herself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (the 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 Office of Administrative Hearings (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 Claimants 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimants:

1. Contract, June 20, 2014
2. Photograph
3. Photograph
4. Photograph
5. Photograph
6. Photograph
7. Photograph
8. Photograph

9. Photograph
 10. Photograph
 11. Photograph
 12. Photograph
 13. Photograph
 14. Berg Contracting Services, LLC, Estimate, September 12, 2014
 15. Cancelled check, June 24, 2014
 16. Cancelled check, July 10, 2014
 17. Cancelled check, August 1, 2014
 18. Estimate, Handyman On Call, LLC, November 26, 2014
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19. Letter, from the Claimants, September 24, 2014, with no addressee

Unless otherwise noted, I admitted the following exhibits offered by the Respondent:

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Photograph
6. Letter, December 3, 2014, from MHIC to the Respondent and the Claimants¹
7. NOT ADMITTED (the Claimants' Better Business Bureau complaint)

I admitted the following exhibits offered by the Fund:

1. Notice of hearing, April 23, 2015
2. Hearing Order, January 27, 2015

¹ Any offer of settlement mentioned in the letter is not admissible.

3. Licensing history
4. Home Improvement Claim Form, December 9, 2014
5. Letter, January 9, 2015, from the MHIC to the Respondent
6. Contract, June 20, 2014

Testimony

Mr. Jackson testified for the Claimants.

The Respondent testified for herself.

The Fund did not present witnesses

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this hearing, the MHIC licensed the Respondent as a home improvement contractor, license number 77775. The current license, or registration, is set to expire on August 26, 2016.
2. Eric Hoskins is the Respondent's longtime boyfriend and employee. The Claimants mistakenly believed that Mr. Hoskins was the Respondent's husband and they did not know that the Respondent, rather than Mr. Hoskins, was the actual license holder.
3. On June 24, 2014, Christine Jackson, the Claimant's wife, entered into a contract (Contract) with the Respondent, through Mr. Hoskins, to perform home improvement at the Claimants' primary residence.² Mr. Hoskins drafted the Contract.
4. The Claimants dealt primarily with Mr. Hoskins throughout the job.

² The Respondent presented the contract to the Claimants on June 20, 2014, and the Claimants accepted on June 24, 2014. Two versions of the contract in evidence are date June 20, 2014. Clmt. Ex 1, Fund Ex. 1.

5. Neither of the Claimants is: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.
6. Neither of the Claimants owns more than three residences or dwelling places.
7. The Claimants' primary residence is a 3,000 square foot colonial with a deck and pool and a fence surrounding the back yard.
8. The Contract provided for eight improvement services, as follows:

1.	Repair sections of the fence, replace the top plates on the fence, power wash and seal the fence with Cabot's cedar tone sealer, and replace gate hinges	\$1,200.00
2.	Repair six deck boards, fix deck rails, power wash and stain the deck with a gray color of Ms. Jackson's choice	\$875.00
3.	Point off/power wash and seal the chimney	\$475.00
4.	Drylock two closet areas in basements;	\$350.00
	Drylock crack	\$125.00
5.	Fix shower door	\$125.00
6.	Clean Gutter	\$75.00

7.	Fix post on porch and garage	\$225.00
8.	Power wash house "with" deck	\$250.00
	TOTAL	\$3,700.00

9. On or after June 24, 2014, the Claimants and the Respondent agreed that the Claimants would pay an additional \$950.00 to remove a bench and to pay for twelve extra deck boards, bringing the total Contract price to \$4,650.00.
10. Mrs. Jackson signed the Contract. Mr. Jackson was not present at the signing.
11. Mrs. Jackson believed that Mr. Hoskins had inadvertently omitted from the Contract his agreement to build flower boxes. She then talked to Mr. Hoskins, who said he would build them for free. Mr. Jackson called Mr. Hoskins, who confirmed this agreement. The parties did not execute an addendum to the contract for the flower boxes.
12. The Claimants made payments to the Respondent by checks and cash as follows:

June 24, 2014	\$1,500.00 by check \$200.00 cash
July 10, 2014	\$200.00 by check \$100.00 cash
July 30, 2014	\$150.00 cash
August 1, 2014	\$1,500.00 by check \$150.00 cash
TOTAL	\$3,800.00

13. The Claimants made the cash payments directly to Mr. Hoskins.
14. The Respondent shattered the Claimants' six-foot shower door while installing a towel bar on the door. The Respondent readily agreed to replace the shower door. She replaced it with a five-foot door. The Claimants paid \$950.00 to purchase and have a contractor install a six-foot door. The Claimants never paid the Respondent money for a shower door or to install a shower door.
15. At some point during construction, Mr. Jackson noticed that food was missing from the house. He told Mr. Hoskins, who offered to pay the Claimants \$20.00 for the food. The Claimants told Mr. Hoskins stop taking food.
16. Later, Mrs. Jackson noticed that some of her jewelry was missing. Mr. Jackson called the Respondent, who passed the telephone to Mr. Hoskins. Mr. Hoskins denied knowing about any stolen jewelry and said he would check with his workers. Mr. Jackson called the police, who tracked some or all of the missing jewelry to a pawn shop. The shop's records showed that someone used Mr. Hoskins's driver's license as proof of ownership of the jewelry. As a result, on August 15, 2014, the Claimants halted all work under the Contract and refused to permit the Respondent on their property. Mr. Hoskins has not been convicted of any charges related to Mrs. Jackson's allegedly stolen jewelry.
17. As of August 15, 2014, the Respondent had not stained the back side of the fence, had not completely painted the deck rail, had not fully repaired the deck, had painted over boards in poor repair rather than replacing them, had improperly installed a fence latch such that the latch would not close, and had not painted a deck beam near the garage. The Respondent was obligated to perform all of this work under the Contract.
18. The Respondent used caulk to point the chimney brick in an unworkmanlike manner.

19. The Claimants obtained an estimate to repair the Respondent's work from Handyman On Call, LLC, a home improvement contractor licensed in Maryland under number 125988. The estimate is for \$2,419.00, including \$375.00 to rebuild the flower pots.
20. The Claimants have not taken any legal action to recover monies from the Respondent other than the instance Claim.

DISCUSSION

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).

The Claimants have proven a threshold question: the Respondent was a licensed home improvement contractor at the time they entered into the contract at issue. The next question is whether the Respondent performed unworkmanlike or incomplete home improvement. This is a thornier issue because the evidence includes two versions of the Contract and some terms of the contract are vague.

The Claimants and the Fund each presented versions of the Contract. The Claimants' copy is the yellow copy of a multi-part, carbonless form. With exceptions, the ink is the type one would see on the second or subsequent copies of a multi-part form. The exceptions are handwritten notations in blue ink, obviously added after the multi-part form was disassembled. The Fund's version of the contract is a photocopy. A substantial portion of the document

matches the Claimants' version. It, however, has additional language. The two versions are distinguished in the following ways:

CLAIMANTS' VERSION	FUND'S VERSION
Next to Item 2 is an arrow pointing to a parenthetical that says "\$950.00 for extra boards"	Does not contain this language
Added handwritten notation: Below Item two is are the words "Behr solid color"	Does not contain this language
At the top appear the following notations: a telephone number, the words "power wash cleaner for car-panel bright," and the words "Flower boxes?"	Does not contain this language
At the bottom appears the notation "7/10 pd \$200 more for extra boards ck \$4624 + \$100 cash"	Does not contain this language
At the bottom: \$3550 [cross out in original] \$3750 [encircled] -\$50 for cash dep. \$3700 [encircled]	Does not contain this language
At the bottom: Gave \$150 7/30 C xmas\$ Gave \$150 8/1 cash \$1500 check \$4629	Does not contain this language
The words "Lori Rose" are circled in the typed sentence "ALL CHECKS MUST BE MADE PAYABLE TO LORI ROSE ONLY."	Does not contain this language
Next to the words "deposit": 1700.00 (1500 ck 200.00 cash) 3700 - 4700 \$3,00 (checks) 700 (cash)	Does not contain this language
Following the language "payment to be made as follows:" is the notation "balance on completion"	Following the language "payment to be made as follows.": " Balance deck or fence balance on completion. To work to being 7/1/14 weather permitting." [Cross out in original]
Above the language "We hereby contract to furnish material and labor to complete in accordance with the above specification" is	Does not contain this language

the notation "6/24 ck \$4621."	
Does not contain this language	Above the word "specifications" in the language "We hereby contract to furnish material and labor to complete in accordance with the above specification" is the initials"LR" and in the margin: Total w/extra deck repairs = \$4700
Next to Item 8 is "\$250.00"	Next to Item 8 is "\$250" in different handwriting than on the Claimant's version
Does not contain this language	At the bottom is the notation: Additional – deck/fence repairs Removal of bench + extra deck boards \$950.00 paid

The added language on the Claimants' version is either Mr. or Mrs. Jackson's notations, which apparently one or the other made during the course of their dealings with the Respondent. The Fund's version contains Mr. Hoskins' handwritten notations. The record does not establish when Mr. Hoskins made the notations. To the extent the versions have common information, and absent evidence to the contrary, I accept that information as contemplated by the parties.

One important difference between the Contracts pertains to a \$950.00 charge. The Claimant's version shows \$950.00 for six extra boards for the deck. The Fund's version shows \$950.00 to remove a bench and for twelve extra deck boards. Mr. Hoskins notation as to the scope of work costing an additional \$950.00 is broader than the Claimants' version, and is more favorable to the Claimants. I accept his notation as representing the agreed upon term. I conclude that the parties contracted for the Respondent to remove a bench and purchase twelve deck boards.

The Claimants assert that the Respondent inadvertently left out of the Contract an agreement to build an unspecified number of flower boxes on the deck. Mr. Jackson testified

that his wife talked to Mr. Hoskins, who said he would build them for free. Mr. Jackson testified that he confirmed this agreement with Mr. Hoskins. The record does not reflect how many boxes the Respondent agreed to build. Nevertheless, Mr. Hoskins apparently built more than one box. Mr. Jackson said the boxes are rotting. Even to the lay eye, a photograph of a flower box shows the rotting wood. Clmt. Ex. 3. A newly built flower box should not rot. The Respondent exhibited unworkmanlike home improvement by building a flower box that rotted in short order. The Claimants, however, did not pay for any flower boxes and, thus, they did not sustain a loss when they hired someone to rebuild them.

The Claimants assert that the Respondent improperly used caulk instead of mortar to point the chimney brick and in any event did so in an unworkmanlike manner. The record does not include expert testimony about whether caulk is a reasonable substitute for mortar. Even if it is an acceptable substitute as the Respondent claims, the the Respondent installed the caulk in a sloppy and aesthetically displeasing way. The photograph the Claimants took of the caulking makes that fact obvious even to a lay eye. Clmt. Ex. 4. The caulk is not neatly placed in the joints between the bricks; rather, the caulk looks messy, like it was applied by a child. The Claimants proved unworkmanlike home improvement and they are entitled to reimbursement for the cost of repair. Mr. Jackson testified that he called a mason and did not get a return call, so he has elected to call the matter a loss.

The Claimants assert that the Respondent did not properly repair the fence. The Contract is vague as to the fence in that it requires the Respondent to "repair five sections." The four corners of the contract do not define the terms repair or fix. It is a sound principle of contract construction that where one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against that party.

Truck Ins. Exchange v. Marks Rentals, Inc., 288 Md. 428, 434 (1980). Mr. Jackson offered credible testimony, not refuted by the Respondent, about what the Respondent was supposed to do.

Mr. Jackson testified that the Respondent was supposed to remove the horizontal length of wood from the fence and shore up the fence so that it would not blow over. The Respondent did not dispute Mr. Jackson's testimony that this work was not done.

The Claimants also assert that the Respondent was supposed to replace damaged decked boards, but instead painted over them. Even to the lay eye, the photographs prove the Claimants point. Clmts. Exs. 5, 6, 12, 13. The Respondent does not dispute that she was suppose to replace the boards. Indeed, that is the only logical reason for the Contract to include the cost to replace boards. The Claimants have proven incomplete home improvement.

The Claimants assert that the Respondent poorly installed a fence latch and the fence would not close. Even to the lay eye, the latch is very crooked and it is easy to see why it would not work properly. Clmt. Ex 7. The contract does not specifically call for the Respondent to install a latch. Mr. Jackson testified that after his wife signed the contract on June 24, 2014, they noticed a few items missing from the contract and Mr. Hoskins agreed to do them for free. The record is not clear what items Mr. Hoskins agreed to do for free, other than the flower boxes. On the other hand, I find it doubtful that the Resondent would install a latch on her own initiative without some agreement with the Claimants. The Respondent testified that she does not believe her workers installed the latch crooked and she recalled seeing the hardware properly aligned. I find it unlikely that the Claimants would take an aligned latch and reinstall it crooked just so that they could make a claim for reimbursement. The picture shows the crooked latch. That is sufficient to prove the unworkmanlike home improvement.

Nevertheless, the Claimants did not pay for the free items and they are therefore not eligible for reimbursement from the fund to replace those items, including the misaligned latch. The Claimants may have some other remedy at law, but that is not for me to decide.

The Contract called for the Respondent to stain the fence a cedar color. The Claimants contend that the Respondent only stained the inside part of the fence – that is, the part of the fence facing toward their yard – but not the back side. The Respondent testified that she did stain the entire fence, front and back side. She then changed her testimony and said that she could not get behind the bushes and tress (that she claims the Claimants have since torn down) and therefore could not stain it all. The Respondent's contradictory testimony makes the Respondent not credible on this point. Also, if the shrubbery was an obstacle, the Respondent would have known that when she or her employee estimated the job and drafted the contract. The Claimants' photograph clearly shows a color difference. The inside of the fence is obviously stained with the "cedar tone" required by the Contract. Clmt. Ex. 1; Fund Ex. 1. The back side of the fence looks old and worn and has a grey color. Clmt. Ex 8 (showing the back side), Clmt. Ex 9 (showing the inside). The Respondent did not stain the back side of the fence as the Contract requires.

The Contract is vague in its reference for the Respondent's obligation to "fix a shower door." The contract does not specify the nature of the fix. Mr. Jackson testified that the Respondent was supposed to fix the hinges. The Respondent concedes this fact and also testified that Mrs. Jackson asked Mr. Hoskins to add a towel bar to the shower door. Mr. Jackson denied that his wife asked for a towel bar. Whether Mrs. Jackson asked for a towel bar is immaterial. The material fact is that Mr. Hoskins shattered the door. The Respondent admits this fact. The parties agree that the Respondent replaced the door with a smaller door than the original. Mr.

Jackson testified and the Claimants presented documentary evidence that the cost to replace and install a six-foot door is \$950.00. Clmt. Ex. 18.

The Claimants and the Respondent agree that the original contract price was \$3,700.00 plus \$950 for additional work, for a total of \$4,650.00. A notation on the Claimants' version of the contract states that the contract price was actually \$3,750.00 less a \$50.00 discount for cash payment. Neither party offered testimony or other documentation proving a cash discount; also, if the Respondent intended to give a cash discount, she would have deducted \$50.00 from \$3,700.00. Regardless, the Claimants did not pay the Contract price in cash and I question their eligibility for a cash discount.³ I find that the total contract price was \$3,700.00.

Mr. Jackson testified that he paid the Respondent a total of \$3,900.00 in checks and cash. The Respondent testified she only accepts checks, as instructed on the Contract. The Contract includes a statement that "ALL CHECKS MUST BE MADE PAYABLE TO LORI ROSE ONLY." Clmt. Ex. 1; Fund Ex. 1. That statement does not say that the Respondent will *only accept checks*; a reasonable interpretation of that statement is that *if a customer pays by check*, the customer should make the check out only to Lori Rose (the Respondent). The Claimants made some cash payments to Mr. Hoskins. Mr. Jackson testified that Mr. Hoskins requested those payments. Mr. Hoskins did not testify and the Respondent would not, and did not, know what Mr. Hoskins requested out of her presence. Mrs. Jackson annotated her version of the contract to show her cash payments, including the amount and the date paid. This evidence is sufficient to prove \$600.00 in cash payments (not \$700.00 as the Claimants allege). *See Finding of Fact 12.* I find that the Claimants paid \$3,200.00 by checks and \$600.00 in cash for a total of \$3,800.00.

³ If the Respondent offered a discount for cash, it would undermine her assertion that she *only* takes cash.

Having found that the Claimants proved unworkmanlike and incomplete home improvement, 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). MHIC's 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 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).

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 Claimants obtained an estimate to repair the Respondent's work from Handyman On Call, LLC, a MHIC-licensed home improvement contractor license number 125988. The estimate is for \$2,419.00, including \$375.00 to rebuild the flower pots. As I explained, the Claimants are not eligible for reimbursement for the flower pots, so the cost to repair is \$2,419.00 less \$375.00, for a total of \$2,044.00.

The Claimants also paid \$950.00 to replace the shower door. The Fund conceded that replacing the door is not a consequential damage otherwise prohibited by COMAR

09.08.03.03B(1). The Fund argued that because the Respondent was obligated under the contract to repair the shower door and the Respondent shattered the door in the process, the Claimants are eligible to reimbursement from the Fund. The Claimant did not argue otherwise.

Using the calculation in COMAR 09.08.03.03B(3)(c), the Claimants actual loss is \$2,144.00, calculated as follows:

	Amt. paid to Respondent	\$3,800.00
+	Amt. to repair/complete	\$2,044.00 (Handyman On Call)
+		<u>\$950.00</u> (shower door)
TOTAL		\$6,794.00
-	Contract price	<u>\$4,650.00</u>
ACTUAL LOSS		\$2,144.00

Mr. Jackson testified that the Respondent got paint on tables in the basement and the tables are now destroyed. The Claimants have not included the value of the tables in their loss and I will therefore not comment further.

Finally, 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). The Respondent seeks dismissal of the Claim on the grounds that the Claimants threw her off the job and refused to allow her expert to examine the property. The Claimants had a compelling reason for not permitting the Respondent to complete the contract and make any necessary repairs: the police tracked Mrs. Jackson’s stolen jewelry to a pawn shop where a person using Mr. Hoskins’ driver’s license pawned the jewelry. Mr. Hoskins has not been convicted of a crime related to the jewelry and I am not responsible to

decide if he is guilty. Suspicions surrounding his involvement in the theft gave the Claimants a compelling basis for refusing to allow the Respondent or her workers back on their property.

The Respondent agreed to have an expert examine "the door." Presumably this is the shower door since that it is only door in question. The Claimants refused to allow the expert, apparently because of the theft issue. I do not need an expert to tell me the Respondent replaced a six-foot door with a five-foot door. Again, the Respondent does not contest this fact. Thus, the Respondent was not prejudiced by the Claimants' refusal.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$2,144.00 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 \$2,144.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁴ and

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

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

Signature on File

August 24, 2015
Date Decision Issued

Laurie Bennett
Administrative Law Judge

LB/cj
#156549

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