

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF BARBARA G. GRANGER,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-10-39814
FOR THE ALLEGED ACTS OR	* MHIC NO.: 08 (90) 1193
OMISSIONS OF HOWARD	*
CONSTANTINE IV, T/A	*
CONSTANT HOME	*
IMPROVEMENTS,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 4, 2008, Barbara G. Granger (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,200.00 for actual losses allegedly suffered as a result of a home improvement contract with Howard Constantine IV, t/a Constant Home Improvements (Respondent).¹

¹The Fund submitted into evidence a subsequent undated handwritten note from the Claimant to the MHIC indicating, confusingly, that the "total cost is \$4,500.00, not \$4,950.00." (Fund Ex. 6.)

I held a hearing on April 29, 2011 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). The Claimant represented herself. The Respondent represented himself. Eric B. London, 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 of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL. Ex. 1 May 18, 2007 contract between the Claimant and the Respondent
- CL. Ex. 2 May 7, 2007 contract between the Claimant and the Respondent
- CL. Ex. 3 May 18, 2007 cancelled check in the amount of \$500.00 from the Claimant made payable to the Respondent; June 22, 2007 cancelled check in the amount of \$2,000.00 from the Claimant made payable to the Respondent; June 26, 2007 cancelled check in the amount of \$2,500.00 from the Claimant made payable to the Respondent
- CL. Ex. 4a-h Photographs
- CL. Ex. 5 November 29, 2007 Specifications from Wallace Roofing Company, Inc.

- CL. Ex. 6 January 4, 2008 cancelled check in the amount of \$2,400. 00 from the Claimant made payable to Wallace Roofing Company, Inc.
- CL. Ex. 7 January 4, 2008 Invoice from Wallace Roofing Company, Inc.
- CL. Ex. 8 August 4, 2009 letter from Douglas W. Lasher, Estimator, Wallace Roofing Company, Inc.
- CL. Ex. 9 December 3, 2007 Proposal from Elms Construction Company

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

- Resp. Ex. 1 The Respondent's undated written statement
- Resp. Ex. 2 November 27, 2007 letter from the Respondent to the Better Business Bureau of Greater Maryland (Better Business Bureau)
- Resp. Ex. 3 December 12, 2007 letter from the Better Business Bureau to the Respondent
- Resp. Ex. 4 Undated letter from the Respondent to the Department
- Resp. Ex. 5 Undated letter from the Respondent to the Department
- Resp. Ex. 6 April 14, 2004 letter from Rosann B. McDairmant to the Respondent

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

- Fund Ex. 1 January 25, 2011 Notice of Hearing
- Fund Ex. 2 October 28, 2010 Hearing Order
- Fund Ex. 3 March 7, 2011 letter from Steven Smitson, Executive Director, MHIC, "To Whom It May Concern"
- Fund Ex. 4 June 3, 2008 Home Improvement Claim Form, received by the Department on June 4, 2008
- Fund Ex. 5 June 23, 2008 letter from the MHIC to the Respondent
- Fund Ex. 6 Undated handwritten note from the Claimant to the MHIC

Testimony

The Claimant testified on her own behalf; she did not present the testimony of any witnesses.

The Respondent testified on his own behalf; he did not present the testimony of any witnesses.

The Fund did not present the testimony of any witnesses.

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 #01-87357.
2. On May 7, 2007, the Claimant and the Respondent signed a proposal, which was handwritten by the Respondent on a piece of the Claimant's stationary, for the Respondent to rebuild and repoint both chimneys on the Claimant's home, and install flashing and reglets on the chimneys, as well as flashing at the roof line, with weep holes in the brick.²
3. On or about May 18, 2007, the Respondent gave the Claimant a handwritten statement signed by him, which indicated that the agreed-upon price for repairing and rebuilding both chimneys was \$5,000.00 and that the Claimant made a deposit of \$500.00 on that date.³
4. On June 22, 2007, the Claimant paid the Respondent \$2,000.00.
5. On June 26, 2007, the Claimant paid the Respondent \$2,500.00.
6. The Respondent completed the work under the Contract sometime in the third or fourth week of June 2007.

² Neither party provided detailed testimony as to what this involved.

³ I will refer to the May 7, 2007 and May 18, 2007 documents, collectively, as the Contract.

7. On or about October 26 and 27, 2007, water came in at least one of the chimneys during a heavy three-day downpour. The Claimant called the Respondent, who came to her home the next day with a bucket and a “slider,” which he set up in the attic. Upon inspection of the chimney, the Respondent found hairline cracks in the cement chimney cap, which he caulked and sealed. He also sealed and painted the cap with grey exterior concrete paint.

8. Water continued to come in at least one of the chimneys. On October 29, 2007, the Claimant again called the Respondent, who came to the home the next day and coated both chimney tops with clear masonry sealant/waterproofer.

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) (Supp. 2010). *See also* COMAR 09.08.03.03B(2). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2010).

MHIC’s regulations offer three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). 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).

For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The parties did not dispute that the Claimant contracted with the Respondent in May 2007 to rebuild and repoint both chimneys on her home, and install flashing and reglets on the chimneys, as well as flashing at the roof line, with weep holes in the brick. The parties also did

not dispute that the Claimant paid the Respondent the total Contract price of \$5,000.00 for the work performed by him.

The Claimant testified that in October 2007, after the Respondent completed the work, water came in the chimneys during a torrential downpour. The Respondent's attempts to fix the problem were unsuccessful and water continued to come in the chimneys. The Claimant submitted into evidence an August 4, 2009 letter from Douglas W. Lasher, Estimator, Wallace Roofing Company, Inc., which stated:

After an examination of the roof . . . on November 28, 2007, we found the Heritage Tamko shingles, the color of antique slate, had stains, dark in color, around the perimeter of both brick chimneys. The rear valley also had some stains top to bottom. There were nail pops from traffic along the lower main ridge vent and ridge vent on the upper main rear of brick chimney. We found the chimneys to be improperly flashed, according to manufacturer's specifications, exposed nails around the perimeter of both chimneys and silicone caulk around the perimeter of both chimneys, which in our opinion is not good roofing practice.

(CL. Ex. 8.)

The Claimant also complained that the water from the chimneys leaked through to her walls, staining them and necessitating repairs. She submitted photographs into evidence and contended that she had a small leakage problem before, but it was much more severe after the Respondent performed work on the chimneys.

The Respondent contended that he properly performed the work under the Contract. He denied using silicone caulk around the perimeter of the chimneys and testified that he had instead used black roofing caulk. The Respondent further contended that after the Claimant called him, he repaired a small leak in one of the chimneys by fixing hairline cracks in the cement chimney top, and that, to appease the Claimant, he also coated both chimney tops with clear masonry sealant/waterproofer. Because he did not hear from the Claimant again, he assumed that any problems had been resolved.

The Respondent contended that the stains on the Claimant's walls were pre-existing and old. He testified that the Claimant's description of the water leakage, observed by him at the time of his first revisit as coming from only one of the chimneys, was grossly exaggerated. According to the Respondent, only a cupful of water leaked through that chimney. He further testified that he observed damage to the Claimant's walls prior to performing work on her house. The Respondent acknowledged that if water came from the flashing, the flashing was not installed properly, but noted that there was no evidence that the water was coming from the flashing.

Although in some cases a claimant may present sufficient evidence in the form of a report from another contractor regarding deficiencies in home improvement work that has been performed, I found the letter from Mr. Lasher submitted by the Claimant in this case to be insufficient to establish that the Respondent performed unworkmanlike or inadequate home improvements.

Mr. Lasher's letter does not indicate that the Respondent caused the stains to the shingles and the damage to the ridge vents, and the Claimant presented no expert testimony or other evidence to that effect. Thus, the only defect possibly suggested is the improper flashing.

With regard to the flashing, Mr. Lasher referred vaguely to manufacturer's specifications, without identifying those specifications, and did not explain why the exposed nails and silicone caulk did not constitute "good roofing practice." Furthermore, Mr. Lasher identified himself only as an estimator and no evidence in the record establishes that his background and experience as an estimator qualifies him to give such an opinion. Thus, I find that an insufficient foundation was laid as to his expertise with regard to flashing and I did not rely upon his report.

Accordingly, I find that the Claimant failed to meet her burden of proving that the Respondent's work was unworkmanlike and inadequate.

I note also that the Claimant produced a Proposal from Elms Construction Company for repairs to her walls; however, she presented no expert testimony that the water damage resulted from the alleged improper flashing. Thus, even if she had proven that the Respondent improperly installed flashing, I find that she failed to prove any connection between any improper flashing and the damage to her walls and could not recover from the Fund for that damage. I note also that consequential damages are not recoverable from the Fund. COMAR 09.08.03.03B(1).

Even if I had found that the Claimant proved that the Respondent improperly installed flashing, she presented insufficient evidence of the cost to repair it. The November 29, 2007 estimate and the January 4, 2008 invoice from Wallace Roofing Company, Inc., is for the amount of \$2,400.00 for clearing out shingles, replacing ridge vents and reflashing the chimneys. The estimate is not broken down to specify the amount attributable to the reflashing. The Claimant contended that \$585.00 of the estimated amount was attributable to the reflashing, but I found the Claimant's testimony regarding the source of that information to be sketchy and did not rely upon it. She initially testified that just before the hearing, she spoke to "someone from Wallace," who told her that the cost to reflash the chimneys was \$585.00. She subsequently testified that it was Mr. Lasher to whom she spoke the morning of the hearing. Regardless, assuming it was Mr. Lasher, for the reasons stated above, I did place any weight upon his opinion.

CONCLUSIONS OF LAW

I conclude that the Claimant has failed to prove that the Respondent's "acts or omissions" resulted in an "actual loss." Md. Code Ann., Bus. Reg. § 8-401 (2010).

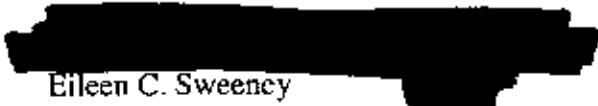
RECOMMENDED ORDER

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

ORDER that the Claimant be denied an award from the Maryland Home Improvement Guaranty Fund; and

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

June 14, 2011
Date Decision Mailed


Eileen C. Sweeney
Administrative Law Judge

ECS/kkc
#123632

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 5th day of August 2011, 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION