

IN THE MATTER OF THE CLAIM OF * BEFORE MICHAEL R. OSBORN,
DONALD M. KNAUFF * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR * OAH NO.: DLR-HIC-02-09-26576
OMISSIONS OF ROBERT FUNK t/a * MHIC NO.: 08 (05) 603
BRYSON COLE CONSTRUCTION *

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On June 24, 2008, Donald Knauff (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,245.00 for actual losses allegedly suffered as a result of a home improvement contract with Robert Funk t/a Bryson Cole Construction, (Respondent).

I held a hearing on June 10, 2010 at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

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 – Complaint Form, State of Maryland, Department of Labor, Licensing and Regulation, Maryland Home Improvement Commission, dated September 24, 2007;
- CL Ex. 2 – Narrative about the project from the Claimant, undated;
- CL Ex. 3 – Contract drawn up by the Respondent for addition to the home of the Claimants, undated;
- CL Ex. 4 – Letter/narrative from the Claimant to DLLR, Maryland Home Improvement Commission, dated June 21, 2008;
- CL Ex. 5 – Letter from the Claimant to the Respondent, dated September 18, 2007;
- CL Ex. 6 – Narrative from the Claimant, undated;
- CL Ex. 7 – String of emails between the Claimant and the Respondent, dated April 21, 2008;
- CL Ex. 8 – Copies of three checks from the Claimant to the Respondent, dated July 8, 2007;
- CL Ex. 9 – Proposed contract from Mill Creek Builders to the Claimants, dated June 20, 2008;
- CL Ex. 10 – Several photographs taken by the Claimants of work done by the Respondent, undated.

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

- GF Ex. 1 – Notice of Hearing from OAH to the Respondent, dated April 21, 2010;
- GF Ex. 2 – Notice of Hearing from OAH to the Respondent, dated April 6, 2010;
- GF Ex. 3 – Notice of Hearing from OAH to the Respondent, dated April 6, 2010;
- GF Ex. 4 – Notice of Hearing from OAH to the Respondent, dated April 6, 2010;
- GF Ex. 5 – Notice of Hearing from OAH to the Respondent, dated May 11, 2010;
- GF Ex. 6 – Affidavit of Hubert Lowery, Investigator for MHIC, dated April 13, 2010;
- GF Ex. 7 – ID Registration Form of DLLR MHIC, dated June 7, 2010;
- GF Ex. 8 – Letter from MHIC with Home Improvement Claim Form sent to the Respondent, dated June 30, 2008.

The Respondent failed to appear. Thus, I admitted no exhibits on the Respondent's behalf.

Testimony

The Claimant testified and presented the following witness: Virginia Knauff, wife of the Claimant.

The Respondent failed to appear.

The Fund presented no 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 86632.

2. On June 8, 2007, the Claimant and the Respondent entered into a contract to construct a two-room addition with adjoining bathroom at the Claimant's Ocean City, Maryland residential property (the project).

3. The project included: conversion of a screened-in porch to interior rooms; construction of exterior and interior walls according to a floor plan, installation of exterior windows and an exterior door, installation of electrical receptacles, switches, lights, and a ceiling fan, insulation of all exterior walls and the attic, installation of drywall and window and door trim, painting all surfaces, installation of closet doors, installation of carpet, and installation of vinyl siding on the new exterior walls; and installation of a toilet, shower, and vanity in the bathroom. An addendum to the contract included installation of new fascia, soffits, and gutters.

4. The work began on June 9, 2007, with an anticipated completion time of two and one-half weeks. The completion time was not made part of the contract, but was the completion time provided by the Respondent to the Claimant in a conversation when the contract was signed.

5. The contract price was \$10,065.00, plus \$1,165.00 for the installation of new fascia, soffits, and gutters, for a total contract price of \$11,230.00. The contract required an initial payment to the Respondent of \$3,000.00, with a progress payment of \$3,000.00 due when framing was complete and windows installed, a \$3,000.00 progress payment after vinyl siding, electrical work, interior walls, and insulation work was complete, and a final payment of \$1,065.00 when all work was complete.

6. On June 6, 2007, the Claimant paid the Respondent an initial deposit of \$3,000.00, and on June 18, 2007, the Claimant paid the Respondent a progress payment of \$3,000.00.

7. The Claimant and his wife were in the process of a planned move of the family residence in Catonsville, Maryland, to the residential project site in Ocean City, Maryland. The Claimant's wife worked part-time in Ocean City. The Respondent maintained a residence in Ocean City, one mile from the project. The distances made face-to-face meetings difficult, though the Claimant's wife occasionally saw the Respondent driving a work truck with the name of a local home builder on it.

8. A second progress payment in the amount of \$2,875.00 was made by the Claimant to the Respondent before the work required to trigger the progress payment. The Respondent claimed he needed more money to buy supplies to move the project along toward completion. The Claimant showed the Respondent he had purchased interior doors at the Claimant's expense as a convenience to the Respondent. This cost of the doors was credited to the Claimant. When the Claimant gave the Respondent the check for \$2,875.00, the Respondent told the Claimant he would return to the Claimant's project with supplies and men as soon as the check cleared. The second progress payment check cleared the next day, but the Respondent neither bought supplies nor returned to continue working on the project as promised. The Respondent explained to the Claimant a month later that he had used the Claimant's money to buy supplies for a different project.

9. The Claimant purchased floor tiles and carpet after the Respondent failed to provide carpet or tile samples from which the Claimant was to make choices. The Claimant purchased the carpet and floor tiles to make it convenient for the Respondent to make progress. The Claimant also purchased two ceiling fans and some bi-fold doors for closets, so the Respondent would have supplies on site on occasions when the Respondent or others showed up to work.

10. The Claimant, or his wife, made numerous phone calls to the Respondent from June through September 2007 and made numerous phone calls in October 2007 to the Respondent to discuss when the Respondent would resume work and complete the project. The Respondent offered various excuses for delays in completion, including that he had been forced to lay off some workers, and that he was no longer doing contracts in Ocean City, Maryland. The Claimant's wife saw the Respondent's vehicle parked at an Ocean City bar on one occasion in the fall of 2007 and she went inside to find him, and when she did she inquired when the Claimant could expect carpet to be laid.

11. From June through September 2007, the Respondent, or men sent by the Respondent, occasionally appeared at the project site, without notice, following which some small amount of work would be done. Such occasions were sporadic and brief.

12. The Respondent sought final payment on the contract during August 2007. The Claimant refused this request as the work on the project was not done to the point at which a final payment would be due, and the work that was done was unacceptable.

13. On some occasions following the start of the project, sub-contractors arrived to do plumbing or electrical work. The sub-contractors complained to the Claimant or his wife they had not been paid so they could not do any work.

14. On September 21, 2007, the Claimant met with the Respondent at the work site to discuss the project. The Respondent agreed to return on September 22, 2007 to work on the project and to return on September 23, 2007 with a plumber to work on the bathroom. Neither the Respondent nor any workers arrived at the project site as agreed on either date.

15. On September 24, 2007, the Claimant sent a letter to the Department in which various complaints were made about the Respondent's quality of work, delays, failure to obtain permits, failed promises, and complaints the Respondent or his men had driven over the Claimant's mailbox twice.

16. In March 2008, a Department investigator, Mr. William Banks (Mr. Banks), contacted the Claimant in response to his letter to the Department of September 24, 2007.

17. Mr. Banks conducted an investigation in an effort to resolve the dispute between the Claimant and the Respondent and to get the project completed. The investigation included an agreed-upon face-to-face meeting on April 22, 2008, with the Claimant, the Respondent, and Mr. Banks in attendance. The Respondent called at the last minute to say that he could not attend, and no meeting took place.

18. The Respondent did not complete the project within the two-and-a-half weeks the Respondent said the work would take. The Respondent never completed the project.

19. Despite repeated demands by the Claimant by phone, by e-mail, by letter, and through personal conversations at the project or wherever the Claimant or his wife could find the Respondent, the Respondent did not repair any deficiency pointed out to him by the Claimant and returned to work on the project only infrequently and seldom remained on the project to make meaningful progress towards completion.

20. Much of the work on the project was performed in an inadequate or unworkmanlike manner, was incomplete, or was not in compliance with the contract or unwritten agreements between the Claimant and the Respondent. The Claimant presented numerous photographs and described why each was taken when he testified. These photos, and his testimony, include the following:

- a. The Respondent did not obtain permits for the project;
- b. Standard framing lumber was used to support the new floor, which was built eighteen-to-twenty-four inches over an exposed concrete slab that had once been a carport. The new floor joists were supposed to be constructed with pressure treated lumber as the floor joists would have no enclosure to protect them from the elements;
- c. Windows were installed too close to the floor. The result is that a person who looks out the window sees eye-to-eye with the window casing at the top of the window, and the windows, when viewed from the outside of the house, are at least a foot lower than the other windows of the house;
- d. An attic access and ceiling fan were installed in such close proximity that the attic access could not be opened because the fan blades were in the way;
- e. A ceiling fan housing was not installed flush to the ceiling;
- f. Drywall was installed with cracks and irregularities showing through the finish coat of paint;
- g. Painted surfaces were painted with the wrong paint – flat instead of satin;
- h. Closet door and room entry door frames were not installed;
- i. Closet door frames that were installed were so out-of-square and bowed at the center that tracked mirror closet doors could not be adjusted to completely close the closet door without a large gap at both the bottom and top of the mirror door;
- j. Exterior siding was not laid smoothly, with resulting ripples and waves in the surface of the siding;
- k. No rear-entry steps were installed;

l. The roof union between the new addition and the existing home was not properly constructed or sealed, with the result that water entered the project at the union between the new and existing roof lines when it rained, and resulting in a large crack and water damage to the drywall ceiling at the union of the roof lines;

m. The bathroom shower stall was four inches narrower than called for by the specifications;

n. The bathroom shower walls were constructed of thin medium-density fiberboard with a painted finish facing, not the porcelain tile the Respondent told the Claimant would be installed;

o. The shower diverter was installed upside-down, with the result that hot water would flow when the handle was turned to the right, and cold water would flow when the handle was turned to the left;

p. Standard non-waterproof caulking was applied to shower stall seams; and

q. None of the bathroom fixtures were vented.

21. The Claimant paid the Respondent \$8,875.00. The Claimant paid \$210.00 for three doors, for a total amount of money paid to the Respondent and for supplies bought by the Claimant of \$9,085.00. The Claimant purchased floor tiles and carpet to make it convenient for the Respondent to make progress. The Claimant also purchased two ceiling fans so the Respondent would have supplies on site with which to make progress if he showed up to work on the project.

22. The Claimant has not had the work performed on the project by the Respondent completed or repaired.

23. On June 20, 2008, the Claimant obtained an estimate from Mill Creek Builders, Inc., MHIC #66937, to supply labor and materials to repair or complete the work done by the Respondent. This estimate included the cost to repair deficiencies, including demolition of work that was inadequate or unworkmanlike, and: repair and construction of all elements of the bathroom; removal of improperly installed windows and installation of the windows at the proper height with headers; installation of ceiling fans; moving the attic access door and closing the entry where the attic access had been installed; construction of stairs and a rail system; demolition of improperly installed room entry and closet door frames and casings and proper installation of same; installation of new carpet and hardwood in the bedrooms and the hallway; repair of damaged drywall and drywall finish and paint work; and completion of all missing trim. The estimate provided for the possibility of rip out, repair, and close-up as necessary to conform the work to the original contract between the Claimant and the Respondent. The estimate also included the possibility of repair of structural and weather damaged areas as they may be revealed and unforeseen plumbing problems at \$55.00 per man hour. The cost of Mills Creek Builders, Inc.'s, estimate for the work to be performed, not including the cost of unforeseen repairs, was \$21,600.00.

24. The Claimant's actual loss is \$19,455.00.

25. The OAH sent notices of hearing to the Respondent at two addresses with which the MHIC was familiar, based on information supplied by the Respondent. These notices were not successfully delivered to the Respondent. The MHIC sent a notice of hearing to an address reflected on Motor Vehicle Administration (MVA) records as recently as April 12, 2010, an address which was vacant when the U.S. Postal Service attempted delivery.

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) (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).

The burden of proof is on the Claimant to prove the validity of his claim. Md. Code Ann., Bus. Reg. § 8-407(e) (2010), COMAR 09.08.03.03A(3).

For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent is required to maintain a current address with the MHIC. Md. Code Ann., Bus. Reg. § 8-309 (2010), COMAR 09.08.01.11. The MHIC is required to send a notice of hearing to the Respondent to the business address on record with the Commission at least ten days before the hearing. Md. Code Ann., Bus. Reg. § 8-312(d), 8-407 (2010), COMAR 09.08.03.03A(2)(c). The OAH, on behalf of the MHIC, sent a notice of hearing to the Respondent, Robert Funk, *1/a* Bryson Cole Construction, by certified and first-class mail at the address of record provided by the Respondent for that business. This notice was returned by the U.S. Postal Service as “addressee unknown.” The certified mail was unclaimed. The MHIC, through the OAH, also sent a notice of hearing to the Respondent by certified mail and first-class mail to his home address. This notice was returned by the U.S. Postal Service as “undeliverable.” The certified mail was unclaimed. On April 12, 2010, the MHIC used its link

to MVA records to locate the Respondent at an address on Blue Marlin Drive in Ocean City, Maryland, an address provided by the Respondent to the MVA. This Ocean City address is the same address contained on the caption of the contract entered into between the Claimant and the Respondent. The MHIC sent notice, through the OAH, by certified and first-class mail to that address, which was returned by the U.S. Postal Service as "vacant." The certified mail was unclaimed. No address to which mail could be forwarded was available at any of the three addresses to which the notices were sent. All notices were sent more than ten days before the hearing.

The hearing notice requirements under the contested case provisions of Maryland's Administrative Procedure Act are similar. *See Md. Code Ann., State Gov't § 10-209 (2009)*. I find that the notice requirements were met in this case.

The Respondent failed to appear for the hearing. I conducted the hearing in his absence. The Fund presented no other evidence that the hearing notice was received by the Respondent. The Respondent's license had expired by the time of the mailing of each of the notices.

When notice has been provided in the manner required by statute or regulation, the party to whom the notice has been directed has no legitimate claim that the notice given was inadequate or defective. *State v. Barnes*, 273 Md. 195 (1974). In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter "reached its destination at the regular time and was received by the person to whom it was addressed." (citations omitted). *Bock v. Insurance Comm'r*, 84 Md. App. 724, 733 (1990). Even testimony that the addressee did not receive the letter does not conclusively rebut the presumption of receipt. Instead, the trier of fact must consider that evidence along with all of the other evidence in the case to determine

whether the letter was mailed and whether the addressee subsequently received it. *Id.* Accordingly, a receipt indicating notice was delivered to the proper address is all that is necessary to satisfy notice provisions for certified mail. Proof that the addressee actually received the notice is not required. Here, there is no evidence the Respondent received any of the three notices sent to him and there was no evidence of delivery.

The facts and circumstances in this case show that notice of this hearing was mailed to the Respondent as required by statute. The Respondent was required by the Commission to maintain a current address on file with the Commission and to notify the Commission of any changes of address. The Commission took the extra step of searching for the Respondent through motor vehicle records to find him. I conclude the Respondent received constructive notice of the hearing. He was the person primarily responsible for maintaining current address information with the Commission, which he failed to do. Thus, I conclude the Respondent was also properly notified of the instant proceeding and that the hearing could properly proceed in his absence as well. COMAR 09.08.03.03.

Third, the Respondent performed unworkmanlike, inadequate, or incomplete home improvements, as laid out in Finding of Fact 20 a-q. The work on the project by the Respondent was abysmal.

The Respondent was given numerous opportunities by the Claimant to return to the project site and complete the work, and the project was never completed. The Claimant demonstrated super-human patience and persistence in his efforts to get the project done by the Respondent, including purchasing supplies at his own expense so materials would be available on site if the Respondent ever made good on any of several promises to return to the site to work. Nothing the Claimant did prompted the Respondent to complete the project.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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). No such claims are made here.

No evidence was presented by the Claimant as to the price paid for the carpet, floor tiles, or ceiling fans. Thus, there is no basis upon which to include the cost of these items in an award.

MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement 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). No evidence was presented nor argument made that the original contract price was too unrealistically low or high to provide a proper basis for measuring actual loss.

The amount paid to the Respondent under the original contract was \$8,875.00, plus \$210.00 for doors that were paid for by the Claimant to advance the project, for a total of \$9,085.00. The Claimant will be required to pay another contractor \$21,600.00 to complete the

original contract, which will require demolition and repair of work already done in an unworkmanlike, inadequate, or incomplete way. The original contract price was \$11,230.00. \$9,085.00 plus \$21,600.00 equals \$30,685.00 minus \$11,230.00 equals a recovery against the Fund of \$19,455.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$19,455.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

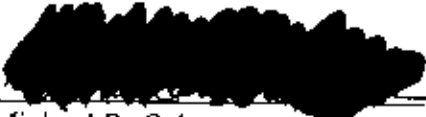
I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$19,455.00; 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 as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

August 12, 2010
Date Decision Mailed


Michael R. Osborn
Administrative Law Judge

MRO/gar
114659

IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
DONALD M. KNAUFF * IMPROVEMENT COMMISSION
v. *
ROBERT FUNK, * MHIC CASE NO. 08 (05) 603
t/a BRYSON COLE COLLECTION *

* * * * *

AMENDED PROPOSED ORDER

WHEREFORE, this 13TH day of December, 2010, Panel B of the Maryland Home Improvement Commission ORDERS that the Proposed Order issued on October 5, 2010 is AMENDED as follows:

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.
- 2) The Conclusions of Law are Amended as follows:

A) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

B) The Administrative Law Judge found that the Claimant paid a total of \$9,085.00 to the Respondent. (Finding of Fact No. 21). Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the Commission may not award more than \$9,085.00 to the Claimant.

- 3) The Proposed Order is Amended as follows:

A) The Claimant is awarded \$9,085.00 from the Home Improvement Guaranty Fund.

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4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.

**Andrew Snyder
Chairperson - Panel B
Maryland Home Improvement Commission**