

IN THE MATTER OF THE CLAIM	* BEFORE JENNIFER L. GRESOCK,
OF BARRY ROWEKAMP,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-11824
FOR THE ALLEGED ACTS OR	* MHIC NO.: 09 (05) 1799
OMISSIONS OF STEVEN A.	*
WALKER,	*
BEFORE AND AFTER, INC.,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On March 16, 2011, Barry Rowekamp (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,200.00 for actual losses allegedly suffered as a result of a home improvement contract with Steven A. Walker (Respondent).

I held a hearing on August 6, 2013, at the Washington County Office Building, 33 West Washington Street, Hagerstown, Maryland, 21740. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407

(2010 & Supp. 2012). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. Despite adequate notice from OAH, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement. Accordingly, I conducted the hearing in the Respondent's absence. *See* Business Regulation Article § 8-312(h); Code of Maryland Regulations (COMAR) 09.01.02.09.

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 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; 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 Summary of Claim, dated March 15, 2011
- Cl. Ex. 2 Proposal #4756, dated December 10, 2008
- Cl. Ex. 3 \$2,700.00 Check to Before & After from the Claimant, dated April 2, 2009
- Cl. Ex. 4 Proposal #4757, dated December 10, 2008
- Cl. Ex. 5 \$4,500.00 Check to Before & After, Inc. from the Claimant, dated December 9, 2008

- Cl. Ex. 6 Proposal #4760, dated December 13, 2008
- Cl. Ex. 7 \$10,000.00 Check to Before & After from the Claimant, dated February 1, 2009
- Cl. Ex. 8 Estimate of Duane Kinna for \$800.00, undated
- Cl. Ex. 9 Estimates of Duane Kinna for \$14,740.00 and \$8,750.00, undated

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

- Fund Ex. 1 Notice of Hearing addressed to the Respondent at 449 Prospect Street, dated April 19, 2013, with returned certified mail envelope
- Fund Ex. 2 Notice of Hearing addressed to the Respondent at 449 Prospect Street, dated April 19, 2013, with returned first-class mail envelope
- Fund Ex. 3 Affidavit of Thomas Marr, dated July 22, 2013
- Fund Ex. 4 Notice of Hearing indicating that a copy was sent to the Respondent, dated July 16, 2013
- Fund Ex. 5 DLR ID Registration, HIC, dated July 31, 2013
- Fund Ex. 6 Letter to the Respondent from Michelle Escobar, Investigator, MHIC, dated March 23, 2011, with attachments including the Home Improvement Claim Form dated February 15, 2011 and an amended Home Improvement Claim Form dated February 15, 2011, and marked as received by Ms. Escobar on March 16, 2011¹

Testimony

The Claimant testified on his own behalf. The Fund did not present testimony.

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 49418.

¹ The Claimant explained that he initially submitted a claim form that referenced an attached letter but that someone at MHIC told him that he needed to fill in the required figures on the form itself. Accordingly, he completed a second claim form on that same date.

2. The Claimant resides at 201 West Main Street, Sharpsburg, Maryland 21782. At all times relevant to the subject of this hearing, this was his sole residence.
3. On an unspecified date in December 2008 or January 2009, the Claimant and the Respondent entered into three contracts for renovations at the Claimant's home.²
4. The first contract, #4756, involved replacing any deteriorated pieces of the front porch trim and then repainting the trim. The contract price was \$2,700.00, which the Claimant paid in full on April 2, 2009. The work was completed to his satisfaction.
5. The second contract, #4757, involved relocating the front porch down spout and repairs to the roof and concrete sidewalk as part of the relocation. It also covered replacement of shutter hardware and adjustments to shutters and repairing the front gate. The contract price was \$1,500.00, which was paid in full on December 9, 2008. The work was completed to his satisfaction.
6. The third contract, #4760, involved removing the sidewalk in the backyard, a concrete wall, wire fencing, and debris; excavating a trench and installing a water line and electrical line for the garage; preparing a pathway for installation of a brick sidewalk; installing concrete steps with flagstone paving; installing railings and a second set of steps; constructing a retaining wall; grading, tarring, and paving a parking area; installing a split rail fence along portions of the rear yard; installing a brick sidewalk; and applying top soil, grass seed, and straw to disturbed areas.
7. The agreed-upon contract price for contract #4760 was \$39,000.00. The Claimant made

² Each of the three contracts bears a date in early December 2008; however, none of them includes the signatures of the parties or the dates on which the parties agreed to the terms.

a payment of \$3,000.00 towards this contract on December 9, 2008, and an additional payment of \$10,000.00 on February 1, 2009.

8. The Respondent began the work, removing part of the concrete sidewalk and some of the wire fencing. This was the only work the Respondent completed on contract #4760.
9. Sometime in late March 2009, the Respondent stopped performing the work he had contracted to do under contract #4760.
10. The Claimant attempted to reach the Respondent by telephone and text message, but the Respondent was unresponsive. The Claimant's last contact with the Respondent was on April 2, 2009.
11. Shortly after the Respondent abandoned the job, the Claimant sought an estimate of the value of the work the Respondent had completed on contract #4760 from Duane Kinna of Duane Kinna Home Improvements. Mr. Kinna estimated the value of the completed work to be \$800.00.
12. At the time Mr. Kinna gave the Claimant an estimate of the value of the work the Respondent had completed, he also provided the Claimant with an estimate of the cost to complete the unfinished work specified in contract #4760. The estimated cost was \$23,490.00.
13. The Respondent's license as a home improvement contractor expired in January 2009, shortly after he and the Claimant entered into the three contracts for work on the Claimant's home.
14. When the Claimant filed a claim with MHIC on March 16, 2011, MHIC notified the Respondent of the claim and requested that he respond within 10 days; the Respondent did not respond to the claim.

15. On April 19, 2013, the OAH mailed a Notice of Hearing by first class mail and also by certified mail to the Respondent at his address of record with MHIC (449 North Prospect Street, Hagerstown, Maryland 21740).
16. The Notice of Hearing sent by certified mail was returned to the OAH by the U.S. Postal Service (USPS) as “unclaimed”; the Notice of Hearing sent by first class mail was returned by USPS as “undeliverable as addressed.”
17. On July 11, 2013, Thomas Marr, an investigator with MHIC, checked the records of the Maryland Motor Vehicle Administration to obtain the most recent address for the Respondent. Mr. Marr confirmed the Respondent’s address as 1306 The Terrace, Hagerstown, Maryland 21742.
18. On July 16, 2013, the OAH mailed a Notice of Hearing to the Respondent at the 1306 The Terrace address. The Notice was not returned to OAH by USPS.

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.2012). *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). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, there was no disagreement that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. (Fund Ex. 5.) I also do not find that the expiration of the Respondent’s home improvement contractor license around the time that he was performing the work on contract #4760 is of any consequence, as the parties

entered into the contract while the Respondent was licensed. Section 8-315(b)(2) of the Business Regulation Article provides that after the expiration, suspension, or revocation of a license, a person may complete and be paid under a home improvement contract that is made but not performed on the date of expiration, suspension, or revocation.

Second, I find that the Claimant established that the Respondent performed incomplete home improvement. The Claimant's unrefuted testimony was that he hired the Respondent to complete the job detailed in contract #4760, and that the Respondent began the job but then abandoned it after completing a small amount of work. The Respondent removed part of the walkway and a portion of the wire fencing; however, the contract called for extensive outdoor renovations, including removing the sidewalk, a concrete wall, wire fencing, and debris in the backyard; excavating a trench and installing a water line and electrical line for the garage; preparing a pathway for installation of a brick sidewalk; installing concrete steps with flagstone paving; installing railings and a second set of steps; constructing a retaining wall; grading, tarring, and paving a parking area; installing a split rail fence along portions of the rear yard; installing a brick sidewalk; and applying top soil, grass seed, and straw to disturbed areas. Clearly, the work that the Respondent completed fell far short of his obligation under contract #4760. The Fund acknowledged that the Respondent had abandoned work on contract #4760 and that the Claimant is eligible for an award.

The Claimant submitted an estimate of the value of the work that the Respondent completed on contract #4760. (Cl. Ex. 8.) Ms. Sachs pointed out on behalf of the Fund that the estimate appeared to be a proposal for work Mr. Kinna would do for the Claimant, not an assessment of the value of work already completed. While Ms. Sachs is correct that on its face, the estimate appears to be a proposal, and not an assessment, I accept the Claimant's testimony

that it is in fact Mr. Kinna's assessment of the value of the work the Respondent had completed on contract #4760. I found the Claimant credible on this point despite the format of the estimate. Accordingly, I find that the Respondent completed only \$800.00 in work on a contract upon which the Claimant had paid \$13,000.00, before the Respondent abandoned the job and avoided all further contact with the Claimant.

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

One of these formulas takes into account the Claimant's solicitation of another contractor to complete the contract. The Claimant did obtain an estimate from Mr. Kinna on the cost of having the work specified in contract #4760 completed by him; however, because the Claimant has not hired Mr. Kinna to complete the work and has no plan at this time to do so, and because the estimate provided by Mr. Kinna is now two years old and likely does not reflect what today's cost would be, I decline to apply the formula that considers the Claimant's solicitation of another contractor.³

Instead, I find that the following formula offers an appropriate measurement in this case: "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

³ Ms. Sachs took the position that calculating the award based on the abandonment of the job, rather than taking into account the estimate the Claimant obtained over two years ago for the completion of the work, was a reasonable approach.

contractor.” COMAR 09.08.03.03B(3)(b). Thus, the Claimant’s actual loss is calculated as follows:

Amount paid to Respondent:	\$13,000.00
Less the value of materials and services Provided by the Respondent:	- \$800.00
Actual Loss:	<u>= \$12,200.00</u>

Hence, the Claimant is entitled to reimbursement in the amount of \$12,200.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$12,200.00 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 \$12,200.00; 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.

October 29, 2013
Date Decision Mailed

JLG/bp
144318

Signature on File

Jennifer L. Gresock
Administrative Law Judge

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