

IN THE MATTER OF THE CLAIM
OF WILLIAM & NORMA PIPKIN,
CLAIMANTS,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF RICK HEISTON,
T/A MORGAN ASHLEIGH CUSTOM
BUILDERS,
RESPONDENT

* BEFORE LORRAINE E. FRASER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-HIC-02-13-07934
* MHIC NO.: 11(90)1057
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On July 6, 2011, William and Norma Pipkin (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,985.00 for actual losses allegedly suffered as a result of a home improvement contract with Rick Heiston t/a Morgan Ashleigh Custom Builders (Respondent). At the hearing, the Claimants' claim was amended to \$20,000.00.

I held a hearing on June 25, 2013 at the Lexington Park Public Library in Lexington Park, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent failed to appear after notice was sent 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 (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimants 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 Claimants' behalf:

- Cl. Ex. 1 Home Improvement Contract, 10/2/09
- Cl. Ex. 2 Credits/Requisitions/Change Orders, 10/27/09-5/7/10
- Cl. Ex. 3 Letter to the Claimants from the Respondent, 8/12/10
- Cl. Ex. 4 Two photographs of the Claimants' roof, taken in October 2010
- Cl. Ex. 5 Letter to the Respondent from the Claimants, 11/12/10; letter to the Claimants from the Respondent, 11/11/10
- Cl. Ex. 6 Letter to the Respondent from the Claimants, 11/15/10; certified mail receipt

- Cl. Ex. 7 Invoice, Lincoln Contractor, Inc., 11/15/10
- Cl. Ex. 8 Estimate, Gass Remodeling, 6/20/13
- Cl. Ex. 9 Photograph of the heating and air conditioning unit hanging on the wall, taken sometime between May 2010 and July 2011
- Cl. Ex. 10 Seven photographs of porch railings, taken sometime between May 2010 and July 2011
- Cl. Ex. 11 Photograph of deck railing, taken June 2013

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

- Fund Ex. 1 Notice of Hearing, 3/29/13; Notice of Hearing 3/18/13; Hearing Order, 2/14/13; Returned certified mail (forwarding time expired); Returned regular mail(forwarding time expired)
- Fund Ex. 2 Transmittal from MHIC to OAH; Hearing Order, 2/14/13; Home Improvement Claim Form, 7/6/11
- Fund Ex. 3 The Respondent's Licensing History, 5/29/13
- Fund Ex. 4 Letter to the Respondent from John Borz, Chairman, MHIC, 7/13/11; Home Improvement Claim Form, 7/6/11
- Fund Ex. 5 Licensing History for Kenneth Gass t/a Gass Remodeling, 5/30/13

The Respondent did not offer any exhibits.

Testimony

The Claimants each testified and presented the testimony of Kenneth Gass, Gass Remodeling, who was accepted as an expert in construction.

The Fund did not present any testimony.

The Respondent did not present any 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 96508. His license has been suspended since October 31, 2011.
2. On October 2, 2009, the Claimants and the Respondent entered into a contract to build an addition (a family room), build a deck, remove and replace the front porch and stoop, and remodel the kitchen. The contract stated that work would begin on October 12, 2009 and would be completed by December 5, 2009.
3. The original agreed upon contract price was \$105,000.00. Through a series of change orders and credits, the contract price was amended to \$112,497.56.
4. Between October 2009 and March 2010, the Claimants paid the Respondent \$112,497.56.
5. During the Respondent's construction of the addition, the Claimants' roof began leaking where the addition attached to the existing roof. The Respondent stated that he repaired the leaks; however, the roof continued to leak.
6. The Respondent and the Claimants agreed that the Respondent would install sand (or beige) colored vinyl posts and rails for the front porch and back deck. Instead the Respondent installed white vinyl posts and rails and painted them a sand color. The paint is peeling off the vinyl and the white vinyl shows in numerous places around the edges and where the paint has chipped off. Also, the railings and deck are not level.
7. While the Respondent was still working on the addition, cracks appeared on the ceiling and seams in the ceiling drywall were very visible. The Respondent covered the ceiling in stucco in an attempted repair. A large crack the length of the ceiling and other cracks in the ceiling reappeared after the attempted repair. In addition, the HVAC unit was not properly hung and pulled away from the wall.

8. The Respondent did not perform any work on the Claimants' property after May of 2010.
9. In November 2010, the Claimants contracted with Lincoln Contractor, Inc., to repair the leaking roof. The Respondent had not tar papered and shingled the roof correctly where the addition met the existing roof. The cost to repair the work the Respondent performed on the roof was \$1,300.00.
10. The cost to remove and replace all the decking is \$20,671.00.
11. The cost to remove and replace the ceiling drywall is \$5,558.00.
12. The cost to re-hang the HVAC unit is \$300.
13. The total cost to repair the Respondent's unworkmanlike work is \$27,829.00.
14. The Claimants' actual loss is \$27,829.00.

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 Claimants have proven eligibility for compensation.

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

Second, the Respondent's home improvement work on the Claimants' home was unworkmanlike. The Claimants' roof began leaking and significant cracks appeared in the ceiling while the Respondent was still working on the Claimants' home. The Respondent attempted to repair the roof and ceiling but the roof continued to leak and the ceiling cracks

reappeared. The roof leaks were the result of the Respondent's failure to properly tar paper and shingle the roof where the addition met the existing roof according to the contractor hired to repair the roof. The ceiling cracks were the result of the Respondent's improper installation of the ceiling drywall according to Mr. Gass. Also, the Respondent installed white vinyl railings and posts instead of the sand color agreed to by the parties and the deck he built is not level. The Respondent attempted to correct the color of the railings and posts by painting the vinyl a sand color; however, according to Mr. Gass the Respondent did not properly sand the vinyl before painting it and the paint is chipping and peeling in numerous places. Mr. Gass explained that the manufacturer makes the vinyl decking in the sand color and that would have been the proper material to use. In addition, the HVAC unit the Respondent hung has since pulled away from the wall. The Respondent did not properly secure the HVAC unit to ensure that it would not pull away from the wall and possibly fall off entirely.

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 those formulas, as follows, offers an appropriate measurement in this case:

(c) 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).

In this case, the Claimants' actual loss can be calculated from their contract with Lincoln Contractor to repair the roof and Mr. Gass' testimony and estimate to repair the ceiling and decking, and re-hang the HVAC unit. The Claimants' actual loss is calculated as follows:

Amount paid to the Respondent under the contract	\$112,497.56
Cost of repairs	+ 27,820.00
Amount of original contract with amendments	<u>- 112,497.56</u>
Actual loss	\$27,820.00

However, the Claimants are entitled to only a portion of their actual loss from the Fund. The maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of a claimant to a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) and (5) (Supp. 2012). The Claimants actual loss of \$27,820.00 exceeds the \$20,000.00 limit on awards from the Fund. As a result, the Claimants are entitled to the maximum award from the Fund: \$20,000.00.

CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual loss of \$27,820.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3)(c). The Claimants are entitled to the maximum award from the Fund, \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) and (5) (Supp. 2012).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$20,000.00; 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.

Signature on File

September 11, 2013
Date Decision Mailed

Lorraine E. Fraser
Administrative Law Judge

LEF
143880

PROPOSED ORDER

WHEREFORE, this 23rd day of October 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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