

<p>IN THE MATTER OF THE CLAIM OF AARON LUBICK AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE VIOLATIONS OF WILLIAM PATTESON, JR., T/A RAUSER PROFESSIONAL CONTRACTING</p>	<p>* BEFORE BRIAN ZLOTNICK, * AN ADMINISTRATIVE LAW JUDGE * OF THE MARYLAND OFFICE * OF ADMINISTRATIVE HEARINGS * OAH NO.: DLR-HIC-02-12-32190 * MHIC NO.: 11 (05) 1147</p>
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RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 26, 2011, Aaron Lubick (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$34,657.00 for actual losses suffered as a result of the acts or omissions made by William Patteson, Jr., T/A Rauser Professional Contracting (Respondent).

I conducted a hearing on June 7, 2013 at the Maryland Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407 (2010 & Supp. 2012). Chris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimant appeared and was represented by Christopher R. Wampler, Esquire. The Respondent appeared and represented himself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the OAH. 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 09.08.03; and COMAR 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent, and if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits, which I admitted into evidence:

- Fund Ex. #1 Notice of Hearing with attached Hearing Order
- Fund Ex. #2 MHIC Licensing Printout
- Fund Ex. #3 Claim Form, dated September 26, 2011
- Fund Ex. #4 MHIC Letter to Respondent, dated September 26, 2011

The Claimant submitted the following exhibits, which I admitted into evidence:

- Cl. Ex. #1 Contract with Respondent, dated February 17, 2010
- Cl. Ex. #2 Change Order, dated October 18, 2010 with attached cancelled check
- Cl. Ex. #3 Calendar pages and e-mails between the Claimant and the Respondent
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- Cl. Ex. #71 Photographs of retaining wall
- Cl. Ex. #72 Photographs of brick work and concrete walkway
- Cl. Ex. #73 Photographs of front walkway
- Cl. Ex. #74 John Heyn's estimate of cost to repair and replace, dated September 22, 2011

The Respondent did not offer any exhibits.

Testimony

The Claimant testified on his own behalf and presented John Heyn, President of JJH Consultants, who was accepted as an expert in construction deficiencies and estimating costs to repair construction deficiencies and complete construction.

The Respondent testified on his own behalf and did not present any witnesses.

The Fund did not present any witnesses.

FINDINGS OF FACT

I find the following 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 license number 3851885.
2. On March 16, 2010, the Claimant and the Respondent entered into a contract for the Respondent to perform exterior construction and remodeling of the Claimant's home at 207 Park Avenue, Mt. Airy, Maryland 21771. The contract called for construction of a side porch addition, a patio retaining wall, a rear awning and a garage as well as renovations to the existing house, which involved demolition work. The terms of the contract are incorporated by reference from Cl. Ex. 1. The contract price was \$157,940.00. There was a change order, dated October 18, 2010, in the amount of \$1,546.50 for a total contract price of \$159,486.50. The change order is incorporated by reference from Cl. Ex. #2.
3. The contract called for work to begin within four weeks of the date of the contract and to be completed within four months from the first day of work.
4. The Claimant paid the Respondent \$141,670.50.
5. The Respondent started performing work on the contract on April 27, 2010.
6. The Respondent poured the footers for the porch addition and garage in May 2010. The Respondent performed no work on the contract for three weeks from June 1, 2010 until June 22, 2010.
7. On July 24, 2010, the Claimant e-mailed the Respondent that he sought a meeting with him to discuss issues related to the retaining wall and other issues of concern.
8. In August 2010, the Respondent missed several deadlines including the following:

- Installation of porch rough framing
- Front porch re-framing
- Exterior painting prep work

9. On October 5, 2010, the Claimant e-mailed the Respondent requesting an update on the job. The Claimant informed the Respondent that he was concerned that it was October and there was still much work left to be done on the contract.

10. On October 19, 2010, the Claimant e-mailed the Respondent seeking a face-to-face meeting to review the construction schedule.

11. On October 24, 2010, the Claimant e-mailed the Respondent that he was very concerned with the status of the project. On October 25, 2010 the Claimant requested a face-to-face meeting with the Respondent on October 30, 2010.

12. On October 28, 2010, Corinne¹ e-mailed the Claimant that she was taking over as project manager for the contract.

13. The Respondent performed no work on the project from January 4, 2011 to April 4, 2011. On April 5, 2011, the Respondent performed soffit repairs and trash removal and then installed a section the gutter on April 7, 2011. The Respondent did not perform any work from April 8, 2011 until April 29, 2011 when he started to work on the garage roof.

14. No work was performed by the Respondent from May 2, 2011 until May 6, 2011 when the Respondent worked on the metal garage roof and the side porch addition.

15. On May 19, 2011, the Complainant e-mailed the Respondent inquiring if he intended to finish the contract and if so, when the project would be completed. On May 20, 2011, the Respondent e-mailed the Complainant indicating that he had never stated that he would not finish the project.

¹ No last name was provided.

16. No work was performed from May 7, 2011 to May 31, 2011 with the exception of May 24th when electrical work for the garage was performed.

17. No work was performed by the Respondent on the contract from June 1, 2011 until June 17, 2011 when the decking on the front and side porch was installed. From June 18, 2011 to June 30, 2011, the Respondent only performed work on the contract on June 23, 27, and 28.

18. During the month of July 2011, the Respondent failed to perform work on the contract on July 1, 2, 9, 11, 12, 13, 14, 15, 18, 19, 20, 21, 25, 26, 27, 28, 29 and 30, 2011. July 3, 10, 17, 24 and 31st fell on Sunday.

19. No work was performed by the Respondent on August 1, 2, and 3, 2011.

20. On August 4, 2011, the Claimant contacted his attorney, Christopher R. Wampler, Esquire (Wampler) to seek termination of the contract. On August 8, 2011, Wampler notified the Respondent by mail of the Claimant's displeasure with the sporadic work, poor workmanship, and missed deadlines to complete the project. Wampler indicated in this letter that the Respondent shall discontinue work and terminate any efforts to complete the contract. The Respondent did not perform any further work on the contract after August 4, 2011.

21. The Respondent completed approximately half of the work contemplated by the contract. The Respondent's work on the garage siding failed to meet the manufacturer's specifications because the panel ends were installed without a 1/8 inch space between them thereby voiding the warranty on the siding. The garage siding needs to be removed and replaced. In addition, the storm windows units will have to be removed and re-installed after the painting work is completed. The following is a list of the incomplete and poor work performed by the Respondent on the contract:

- No cap on front chimney
- Metal roofs require painting and the roof ridge requires repair
- Side porch work is incomplete
- New shutters were not installed

- New rear doors, storm doors, and screen doors were not installed
- Canopy support brackets were not aligned properly
- Incomplete siding on the side porch
- Incomplete painting
- Window painting and caulking is incomplete
- Rain gutters and downspouts were incomplete
- No lattice work around base of front porch
- Porch siding does not align with house siding
- Uneven joints and uneven nailing on the porch
- Porch flooring end cap was not fitted or secured properly
- Porch ceiling and electrical work was not completed
- Porch columns not covered
- Uneven work on aluminum trim
- Support posts not covered with aluminum trim
- Porch railing tilts toward porch deck allowing water to pool on deck
- Porch trim work and floor painting is incomplete
- Siding work under the porch is incomplete
- Garage roof lacks cupola and weathervane
- Garage downspout is missing an elbow and drain pipe
- Garage siding is poorly fitted and installed improperly
- Rear garage door opens in the wrong direction
- Framing for garage is sitting on the ground and some of the wood is not pressure treated
- Windows are painted closed
- Brickwork needs acid washing
- Concrete walkway was scored unevenly

22. The cost to correct deficient work and complete the contract is \$52,707.00.

23. The Claimant paid a total of \$48,423.62 to other contractors to repair and complete the Respondent's work. The entire project has not been completed.

DISCUSSION

Maryland law provides that an owner may recover compensation from the Guaranty 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). Section 8-401 of the Business Regulation article defines “actual loss” as “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 to establish the unworkmanlike or inadequate home

improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (Supp. 2012).

The contract in this case called for extensive renovation and an addition. Based on the testimony of the Claimant, as well as the photographs of the job and the report of Mr. John Heyn, it is clear that the job was performed in an unworkmanlike manner and was not completed. The work began on April 27, 2010 and was to be finished within four months of the start date in accordance with the contract. More than a year later, the job was not nearly complete. The Claimant frequently communicated with the Respondent regarding their displeasure in the delay of the completion of the contract, but the Respondent simply blamed the weather the Claimant's inability to choose certain paint colors and building product specifications for his inability to timely complete the project. Although the weather in January and February 2011 may have been sub-par, there still were long stretches of time in March, April, May, June and July 2011 in which no work was performed by the Respondent. Further, the Respondent admitted during cross examination that some of the causes of delay in the project were because he should have done a better job with scheduling the work on this project.

The Respondent also argued that he did not abandon the contract but was barred from the property after the Claimant terminated the contract on August 4, 2011. I disagree. The Respondent effectively abandoned this contract through his extremely sporadic work which included entire months when he failed to do any work on the project. The contract indicated that the project would be completed four months after the start of construction. By August 2011, fifteen months had passed from the start of the project and there remained numerous major items that were not completed. Furthermore, much of the work was not performed in accordance with industry standards and thus would require repair or replacement. For instance, the garage siding was installed improperly thus resulting in the voiding of the warranty with those materials. The

Claimant provided the Respondent numerous opportunities to get back on schedule and complete the project but through his inaction, the Respondent failed to provide the Claimant any assurances that the job would be completed.

In his report, Mr. Heyn, an expert hired by the Claimant, provided an estimate of \$52,707.00 to correct the deficient work and complete the job.

The Claimant hired subsequent contractors to try to repair and complete the project after the Respondent's contract was terminated. The Claimant submitted a list of itemized expenses and cancelled checks he paid to other contractors to complete the work. The Claimant paid a total of \$48,423.62 to those contractors. The Claimant estimated it may cost another \$10,000.00 to complete the project. The total cost of \$58,423.62 is certainly consistent with Mr. Heyn's estimate of \$52,707.00. As pointed out by Mr. Heyn in his report, a premium would be charged by another contractor because of the incomplete and poor work done by the Respondent. Yet, as the Claimant failed to substantiate his estimate of \$10,000.00 to finish the contract, I will accept Mr. Heyn's estimate as the cost to repair and complete the project.

COMAR 09.08.03.03B states in pertinent part:

Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

...

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

....

(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.

I calculate actual loss in this case as follows:

Amount paid to Respondent	\$141,670.50
Amount needed to finish/repair	<u>\$ 52,707.00</u>
	\$194,377.50
Minus contract price	<u>\$159,486.50</u>
Actual Loss	\$ 34,891.00

Under the law, the maximum recovery from the Fund is limited to \$20,000.00. Md. Code Ann., Bus. Reg. §8-405 (a) and (d) (Supp. 2012). Therefore, the Claimant's actual loss must be reduced to the statutory limit of \$20,000.00.

CONCLUSIONS OF LAW

For the reasons discussed above, I conclude that the Claimant has established by a preponderance of the evidence that the Respondent performed home improvement work in an unworkmanlike manner and abandoned the job. I further conclude that the Claimants suffered an actual loss compensable by the Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and 8-407(e)(1) (2010 & Supp. 2012).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and

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

Signature on File

August 29, 2013
Date Decision Mailed

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#144731

IN THE MATTER OF THE CLAIM * BEFORE BRIAN ZLOTNICK,
OF AARON LUBICK AGAINST * AN ADMINISTRATIVE LAW JUDGE
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WILLIAM PATTESON, JR., T/A * MHIC NO.: 11 (05) 1147
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FILE EXHIBIT LIST

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