

IN THE MATTER OF THE CLAIM	* BEFORE HARRIET C. HELFAND,
OF FRANK AND LIZ DICKSON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-27718
FOR THE ALLEGED ACTS OR	* MHIC NO.: 11(75)547
OMISSIONS OF TIM HOCKENSMITH	*
T/A HOCKENSMITH-GRANGER	*
CUSTOM BUILDING AND	*
REMODELING, INC.,	*
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 April 21, 2011, Frank and Liz Dickson (Claimants)¹ filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,840.00 for actual losses allegedly suffered as a result of a home improvement contract with

¹ Both Claimants attended the hearing; Mr. Dickson was the only claimant who testified. He is referred to as the "Claimant" in this decision.

Tim Hockensmith t/a Hockensmith-Granger Custom Building and Remodeling, Inc.,
(Respondent).

I held a hearing on July 18, 2013, at the Office of Administrative Hearings (OAH), in Hunt Valley, 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 or DLLR), represented the Fund. The Claimants appeared, but were unrepresented by counsel. Melissa Hockensmith, Esquire, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the 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:

- | | |
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| Cl. #1 | Contract Agreement, dated May 3, 2009 |
| Cl. #2 | Package of Documents, including the following: |
| | <ul style="list-style-type: none">• MHIC Complaint Form• Chronology• Contract Agreement, dated May 3, 2009• Construction Specifications, dated May 6, 2009 |

- Letter from Claimants to Respondent, dated May 7, 2010
- United States Postal Service (USPS) Track and Confirm Search
- Invoice from Sweeney Engineering, P.C., dated June 4, 2010
- Email, dated June 15, 2010
- Email, dated July 19, 2010
- Email, dated September 26, 2010
- Email, dated September 26, 2010
- Email, dated September 26, 2010
- Contract Agreement, dated September 27, 2010

Cl. #3 Proposal, Owings Home Services, dated October 5, 2010

Cl. #4 Estimate, Luke Steckel Enterprises, L.C., dated July 14, 2013

Cl. #5 Curriculum Vitae, William B. Rockey, P.E., LEED A.P.

Cl. #6 Report, Century Engineering, dated February 8, 2013

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

GF #1 Notice of Hearing, dated March 19, 2012 (with attachments)

GF #2 Package of Documents, including the following:

- Letter to Respondent from Niki McCormally, Assistant Attorney General, DLLR, dated February 20, 2013
- Memorandum, re: Returned Correspondence, dated October 24, 2012
- Notice of Hearing, dated October 3, 2012
- Copy of Envelope, Certified Mail-Unclaimed
- Transmittal, DLLR/MHIC to OAH, undated
- Hearing Order, dated June 25, 2012

- Home Improvement Claim Form, received April 21, 2011
- OAH Hearing Instructions

GF #3 Package of Documents, including the following:

- Transmittal, DLLR/MHIC to OAH, undated
- Hearing Order, dated June 25, 2012
- Home Improvement Claim Form, received April 21, 2011

GF. #4 Respondent's Licensing Information

GF #5 Letter from MHIC to Respondent, with attachment, dated April 22, 2011

GF #6 Licensing Information, Owings Home Services, LLC

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

Resp. #1 Printout from website www.millbrookcircle.com

Resp. #2 Letter from Respondent to DLLR/MHIC, with attachment, dated December 1, 2010

Testimony

The Claimants presented the testimony of the Claimant and William Rockey, P.E., LEED A.P., who was accepted as an expert in building structures.

The Fund did not offer any testimony.

The Respondent testified on his own behalf.

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 # 4058446.
2. On May 3, 2009, the Claimants and the Respondent entered into a contract agreement (Contract) to perform a ceiling renovation in the kitchen and living room areas of their

home located in Baltimore, Maryland, and replace the original flat ceiling with a vaulted ceiling. Specifically, the Contract provided that the Respondent:

- Install 2 x 10 rafters next to existing rafters
- Install 2 x 8 x 12 ceiling joists
- Remove old ceiling joists
- Install insulation in ceiling
- Build 2' bulkhead on perimeter of room

Existing drywall and electric were to be removed prior to the Respondent's work.² The ceiling renovation was part of a kitchen renovation performed by another contractor, Brian Naylor (Naylor). The Respondent had been recommended to the Claimants by Naylor.

3. The Contract also provided that the Respondent close and trim out a hallway off to the master bedroom and move and trim out back bedroom opening to hall area (trim-out work).
4. The Contract provided that the cost of the ceiling work was \$11,880.00 and the cost of the trim-out work was \$1,175.00, for a total Contract cost of \$13,055.00.
5. The Contract stated that work would begin within three weeks of receipt of the down payment and signed Contract (unless the prior demolition was not ready prior to June 12, 2009). The Contract stated that the construction would be substantially complete within two weeks of the start date.

² Prior to the execution of the Contract, the Claimant offered to pay for architectural drawings to facilitate the ceiling renovation. The Respondent stated that he would be able to consult with a professional engineer at Reisterstown Lumber, where he would be procuring the materials for the project, and that the Claimants did not have to independently obtain or pay for architectural drawings.

6. The Contract provided for a down payment of \$4,350.00, with final payment of the balance due on the date of substantial completion.
7. The Respondent performed the work under the Contract, which was completed on or about July 1, 2009. The Claimants paid the Respondent the entire amount of the Contract.
8. Within weeks of completion of the Contract, the Claimants noticed cracks in the drywall seams and drywall tape began to fail and separate from the ceiling. The Claimants obtained the services of a drywall installer to repair the problems, but the cracks and separations recurred. Also, gaps appeared between the cabinetry and wall and the cabinetry and the ceiling.
9. In or about February 2010, the Respondent, along with Naylor, came to inspect the ceiling. The Respondent told the Claimants that he would confer with his engineers and return to repair the work if it had been done incorrectly.
10. In May 2010, the Claimants contacted Sweeney Engineering (Sweeney) to evaluate the ceiling. Sweeney came to evaluate the ceiling on May 27, 2010, with the Respondent present.
11. In early June 2010, Sweeney verbally reported to the Claimants that the structure did not meet code. At this time, the Claimants informed the Respondent of Sweeney's findings and requested that he obtain drawings from Sweeney or another engineer of his choosing to determine how the structure could be repaired to meet code. The Respondent did not contact another engineer and the Claimants obtained drawings from Sweeney.

12. In September 2010, the Claimants met with the Respondent to discuss the scheduling and timetable to repair the ceiling structure. The Claimants told the Respondent that they needed a licensed electrician to perform work and that Sweeney or another engineer would have to inspect the work prior to completion. The Claimants also requested that the Respondent provide them with another contract detailing the scope of work to be done; the names and license numbers of the electrician performing the work; the name of the drywall contractor; a statement that a licensed engineer would inspect the work upon completion; indication of how the countertop, cabinetry and flooring would be protected; and a statement that the Claimants would not be charged for the work.
13. On September 27, 2010, the Respondent hand-delivered a contract to the Claimants.
14. On the same day, the Claimants contacted the MHIC to inquire about the Respondent's licensing status. The Claimant learned that the Respondent's MHIC license was "inactive." MHIC advised the Claimants not to permit the Respondent to perform work in their home without an active license. The Claimant informed the Respondent that he could not return to perform work without an active MHIC license.
15. The Claimant's roof consists of slate shingles over roofing felt supported by 1 x 6 plank decking.³ The decking is supported by 2 x 6 rafters spaced at sixteen inches on the center. The rafter slope at approximately five units vertical to twelve units horizontal and meet at a 2 x 8 ridge board.

³ Slate shingles are much heavier than shingles made from other common roofing materials.

16. Originally, the bottoms of the rafters were tied together by ceiling joists. In the course of the project, the Respondent nailed 2 x 10 rafter scabs to the side of each 2 x 6 rafter. New 2 x 10 rafter ties spaced at sixteen inches on the center were installed two to eleven inches higher than the original ceiling joists.
17. The new rafter ties were connected to the 2 x 10 scabs with 9-12d nails and a #12x4 inch long hex washer-head screw. The original ceiling joists were removed to create the vaulted ceiling.
18. The 12d nails used by the Respondent were smaller than traditional 12d nails, and had less shear and pull-out capacity than traditional 12d nails.
19. The nails and screws used to connect the rafters and rafter ties are too few and too small and cannot transfer the force in the rafter tie to the rafter. Additionally, the angle in which the nails and screws were embedded renders them susceptible to pull out and allows the rafter tie to separate from the rafter.
20. The inadequate connection between the rafter tie and the rafter was the root cause of the cracks in the drywall. The insufficient quantity and type of fasteners caused the connection to slip, prompting the drywall joint at the intersection of the flat and sloped portions of the vaulted ceiling to crack and separate.
21. The sloped portions of the vaulted ceiling do not contain the proper amount of insulation.
22. If left uncorrected, the roof will fail.
23. The configuration of the roof modifications fall outside of the limits of the 2006 International Residential Code (IRC), and required an engineered design.

24. The Respondent never consulted with a structural engineer prior to construction to evaluate the existing roof framing.
25. In order to repair and adequately rebuild the ceiling and reinforce the connection between the rafters and rafter ties, the drywall and insulation will need to be completely removed, along with the kitchen cabinets, perimeter bulkheads and partition walls. The kitchen island will need to be removed or covered with sturdy protective material.
26. The Claimants have obtained two estimates for repairing the ceiling, both from licensed contractors. An estimate from Owings Home Services (Owings), dated October 5, 2010, covers the repair of the ceiling for \$22,840.00. An estimate from Luke Steckel Enterprises L.C. (Stekel), covers the repair of the ceiling for \$21,000.00.

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 Claimant has 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 performed an inadequate home improvement. The Claimants presented convincing evidence from their expert, Mr. Rockey, an experienced structural

engineer, who described the problems associated with the Respondent's work in great detail. The ceiling structure, built without prior guidance from a structural engineer, as required by code, contained an inadequate number of rafters, and was held together with nails, screws, and junctures that were too small to support the structure. Because the underlying construction was so faulty, Mr. Rockey was adamant in his prediction that, at some point, the roof would fail.

It was clear from the Respondent's testimony that although he did not consult with a professional engineer, he believed that the structure was sound. He speculated that the separation of the drywall was due to inadequate installation of the drywall (which he did not perform) and the effects of heat expansion. The Respondent was willing to return to the project to repair any problems and noted that at the time the Claimants rejected his return, his MHIC license was inactive due to an administrative issue, rather than a problem with his work.

The Claimants' rejection of the Respondent's offer to return was not unwarranted. They understood that the ceiling work was replete with problems, many of which they suspected were beyond the Respondent's capacity to repair. An MHIC representative had discouraged them from reengaging the Respondent due to his licensing status. The Claimants' reluctance and ultimate decision not to permit the Respondent to return was reasonable.

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:

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).

The Claimants' actual loss is calculated as follows:

Amount Paid to Respondent	\$11,880.00 ⁴
Amount Required for Repair	+ <u>22,840.00</u>
Total	\$34,720.00
Original Contract Price	- <u>11,880.00</u>
Actual Loss	\$22,840.00

Although by this measurement, the actual loss is calculated at \$22,840.00, this figure cannot constitute an award from the Fund. The actual loss in the calculation is based on the Owings estimate, found to be more realistic than the Steckel estimate because of its detail. However, choosing between the estimates is essentially an academic exercise, because recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2012). The Claimants paid \$11,880.00 to the Respondent, which is less than their actual loss computed using the formula noted in COMAR 09.08.03.03(c), no matter which estimate for repairing the Respondent's work is used. Hence, the Claimants are entitled to reimbursement in the amount of \$11,880.00 from the Fund.

⁴ This is the amount of the Contract specifically attributed to the ceiling work. This figure will also be considered as the original contract price.

CONCLUSIONS OF LAW

I conclude that the Claimants have sustained a compensable loss of \$11,880.00 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 Claimants \$11,880.00 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

Harriet C. Helfand
Administrative Law Judge

HCH/tc
#143921

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FILE EXHIBIT LIST

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