

CLAIM OF PENNY FLEMING,

CLAIMANT

AGAINST THE MARYLAND HOME

IMPROVEMENT GUARANTY FUND,

REGARDING THE ALLEGED ACTS AND

OMISSIONS OF GARY SAMPSON, T/A

TIGER ROOFING, INC.,

RESPONDENT

* BEFORE MICHAEL D. CARLIS,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

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* OAH No.: DLR-HIC-02-13-35517

* COMPLAINT No.: 11 (90) 968

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STATEMENT OF THE CASE

On January 22, 2013, Penny Fleming (Claimant) filed a claim for reimbursement with the Maryland Home Improvement Commission (Commission) Guaranty Fund (Fund). The claim alleged that Gary C. A. Sampson, t/a Tiger Roofing, Inc., (Respondent) performed unworkman-like and inadequate home improvement that resulted in an actual loss of \$2,160.00. On August 23, 2013, the Commission issued a Hearing Order and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 16, 2014, I convened a hearing in LaPlata, Maryland.¹ Md. Code Ann., Bus. Reg. § 8-407 (Supp. 2014).² The Claimant was present.³ The Respondent represented himself. Hope M. Sachs, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Commission's Hearing Regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 09.01.03 and 09.08.03; and COMAR 28.02.01.

ISSUES

The issues are: (1) whether the Claimant incurred costs for restoration, repair, replacement, or completion that arose from the Respondent's unworkmanlike, inadequate, or incomplete home improvement;⁴ and, if so, (2) what is the amount of the Claimant's compensable actual loss.

SUMMARY OF THE EVIDENCE

Exhibits

The following exhibits were admitted for the Claimant:

Claimant 1: Home improvement contract between the Claimant and Respondent;

Claimant 2: Letter to the Respondent, dated April 8, 2011;

Claimant 3: Letter to the Claimant, dated April 19, 2011;

¹ The hearing was initially scheduled for July 9, 2014, but was postponed at the Respondent's request based on a conflict with a planned vacation.

² All subsequent citations to the Business Regulation Article are only to sections of the 2014 Supplement, unless otherwise noted.

³ Due to the Claimant's high anxiety level, I allowed her adult daughter to take a lead role in presenting the Claimant's case, without any objections from the other parties and pursuant to a power of attorney. Code of Maryland Regulations (COMAR) 28.02.01.11B (11).

⁴ A "'home improvement' means [] the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence[.]" Section 8-101(g)(1)(i) (2010).

Claimant 4: Email to Respondent, dated May 4, 2011;

Claimant 5: Email to Respondent, dated May 5, 2011;

Claimant 6: Email to K. James, dated May 17, 2011; email to Respondent, dated May 17, 2011; email to K. James, dated May 17, 2011; and email to Respondent, dated May 17, 2011;

Claimant 7: Weather history for Leonardtown for May 21, 2011;

Claimant 8: Estimate from Feicht Contracting LLC;

Claimant 9: Advantage-Lok Installation Manual;

Claimant 10: Galvalume Warranty;

Claimant 11(a-d): Photographs;

Claimant 12: Letter to Claimant, dated March 18, 2011; and

Claimant 13: Letter to Claimant, dated February 18, 2011;

The following exhibit was admitted for the Respondent:

Respondent 1a: Letter to M. Escobar, undated.⁵

The following exhibits were admitted for the Fund:

Fund #1: Memorandum to Legal Services, with attachments, dated August 18, 2014;

Fund #2: Licensing history for the Respondent;

Fund #3: Letter to G. Sampson, with attachments, including cancelled checks written by the Claimant; and

Fund #4: Facsimile Transmittal Sheet to M. Escobar, with attachment, dated April 19, 2011.

Testimony

Katelyn James, the Claimant's daughter, and Michelle Escobar, Investigator for the HIC, testified for the Claimant.

The Respondent testified for himself.

The Fund did not offer witnesses.

⁵ Respondent 1b was not admitted.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Commission licensed the Respondent as a home improvement contractor during all times relevant to this matter.
2. The Claimant owns and resides in a home in Hughsville, Maryland.
3. On December 17, 2010, the Claimant and Respondent entered into a home improvement contract.⁶ The Respondent agreed to provide labor only for the installation of an Advantage-Lok II metal roof “as outlined in the manufacturer’s warranty requirements.” The Claimant agreed to pay a total of \$7,200.00 for the installation, with an initial payment of \$2,160.00.
4. On December 23, 2010, the Claimant paid \$2,160.00 to the Respondent.
5. Union Corrugating Company (Union) is the manufacturer of the roof and provides a limited thirty-year warranty. However, the warranty does not apply in the event of deterioration of the panels “caused by direct or indirect panel contact with fasteners.”
6. The Respondent installed the roof with fasteners that made direct contact with the panels. In addition, the Respondent did not “hem” the sides of the end panels and installed improperly constructed flashing. Furthermore, after the installation, evidence of a roof leak appeared in the home’s crawl space.
7. On or about April 19, 2011, the Respondent agreed to remove and replace the roof that had been installed in an unworkmanlike and inadequate manner. The replacement was scheduled for May 17, 2011.
8. The Respondent did not show up to the Claimant’s home on May 17, 2011, to begin the replacement of the roof and refused to replace the roof.

⁶ A “home improvement contract” is “an oral or written agreement between a contractor and owner for the contractor to perform a home improvement.” Section 8-101(h) (2010). An “[o]wner” includes a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement.” Section 8-101(k) (2010).

9. On May 23, 2011, the Claimant entered into a labor only contract with Feicht Contracting (Feicht) to remove and replace the roof for \$12,875.00. Feicht replaced the roof, and the Claimant paid \$12,875.00 to Feicht by November 14, 2011.

DISCUSSION

General Law

Under Section 8-405(a), the Commission may compensate an “owner . . . for an actual loss that results from an act or omission by a licensed contractor[.]” Under COMAR 09.08.03.03B(2), compensation is “only . . . for actual losses . . . incurred as a result of misconduct by a licensed contractor.” “Actual loss” is “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Section 8-401.

COMAR 09.08.03.03B governs the measurement of actual loss:

(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:

(a) If the contractor abandoned the contract without doing any work, the claimant’s actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) 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 contractor.

(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.

Undisputed Facts

The Claimant and Respondent agree they executed a home improvement contract on December 17, 2010. The contract provides for the Respondent to install an Advantage-Lok II roof on the Claimant's home, and for the Claimant to pay \$7,200.00 for the installation.⁷ There is no dispute that the Claimant paid \$2,160.00 to the Respondent as a deposit on December 23, 2010.

Ms. James testified that the Respondent's installation was "improper[]." ⁸ She specifically testified that the panels at "the very edge of the roof" were "installed improperly" because they were not "hemmed . . . around the edges." Ms. James also testified that the screws used to secure the roof remained visible, which, along with the non-hemmed edges, nullified the manufacturer's warranty and caused leaks. Ms. James additionally testified that the flashing installed by the Respondent contained two pieces attached together instead of a single piece of adequate width. Photographs corroborate Ms. James's testimony about the visible screws, the non-hemmed end panels, and the flashing.

Mr. Sampson admitted: "I do not dispute that we had some problems with installation" and "I do not dispute that we made mistakes." He testified: "We made some mistakes on the trim. We made some mistakes in the valley."⁹ There was [sic] a couple of panels that had nail dings in them." Mr. Sampson also testified about the valley section of the roof where visible fasteners remained: "The valley piece is done wrong." Finally, although he testified that he

⁷ The Claimant purchased the materials. The Respondent installed the roof. Union Corrugating Company manufactures and warrants the roof, which it describes as a "hot-dipped aluminum-zinc alloy coated Galvalume™ steel roof[]." Claimant 10.

⁸ Ms. James testified from personal knowledge.

⁹ Later on Mr. Sampson testified, "The valley is done wrong."

looked in the home's crawl space for signs of a leak on March 13, 2011, he did not recall if he had seen damage. However, in a letter to the Claimant on March 18, 2011, he wrote that he would "address the leak."

Based on the evidence reviewed above, I find that the end-roof panels were improperly installed, the flashing was not cut properly for installation, fasteners were in direct contact with the roof panels, and the roof leaked. Based on these findings, I further find that the Respondent's home improvement work was inadequate and unworkmanlike.

Analysis

The disagreement between the Respondent and the Claimant is whether the Claimant rejected the Respondent's good faith effort to resolve the claim. Section 8-405(d) provides: "[T]he Commission may deny a claim if the Commissioner finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim."

The Respondent testified that "this was a fixable job." He argued: "I do concede to the fact that we did make mistakes on this job but they were all fixable and did not require an entire replacement." And, "We were always willing to go out and do the needed repairs . . . and stand by what we did."

On the other hand, Ms. James testified that Union said the roof was incorrectly installed, needed to be replaced, and agreed to supply all the materials because it had recommended the Respondent to the Claimant as a competent roof installer.¹⁰ The Claimant argued that the Respondent agreed to replace the roof but never did.

The "scope" of the home improvement contract includes: "Install Advantage Lok II as outlined in manufacturers [sic] warranty requirements." Claimant 1. The manufacturer provides

¹⁰ Mr. Sampson did not refute that "the contractor" was present with the Claimant, Ms. James, and a representative from Union where the manufacturer's representative said, according to Ms. James's testimony, that the incorrectly installed roof had to be replaced in its entirety.

a thirty-year limited warranty but includes the following exclusion: **“This warranty DOES NOT APPLY in the event of: . . . • In the event of deterioration of the panels caused by direct or indirect contact with fasteners. . . .”** Claimant 10 (emphasis in the original).

The Respondent argues: “The Claimant failed to prove by anything in writing, by anybody certified, that that entire roof needed to be replaced.” He further argues: “We were always willing to go out and do the needed repairs and stand by what we did. I do concede to the facts that we did make some mistakes on this job, but they were all fixable and did not require an entire replacement.”

Much attention at the hearing was given to Claimant 3, a letter from the Respondent to the Claimant that states in its entirety as follows: “In response to your letter dated April 8, 2011, we would like to do the work as a complete tear off. We can do the installation within the dates you have requested.” Claimant 3. Mr. Sampson testified that the signature on this letter is not his. However, the April 8, 2011, letter is consistent with an email on May 5, 2011, from the Respondent’s secretary to Ms. James that reads: “We have coordinated the date of May 17, 2011, to begin the replacement process. Teal [the representative of Union] will be on the site throughout the job.” Claimant 5. Mr. Sampson testified that he had no knowledge of this email.

For the following reasons, I do not find Mr. Sampson’s denial of his signature on Claimant 3 or his testimony that he had no knowledge of Claimant 5 believable. On May 17, 2011, the Respondent failed to appear at the Claimant’s home to replace the roof, giving the following explanation in an email on the same date: “It has come to our attention that you have changed the color of the roofing material. This would mean that all the trim would need to be replaced. We are ready, willing, and able to repair any of our work that is needed. We are not

willing to replace trim panels that are installed correctly and do not need to be replaced.”¹¹

Claimant 6. Ms. James responded to the email on the same date, reminding the Respondent that he agreed to a complete tear-off and replacement of the roof. The Respondent responded to that email, stating: “We have received your email. As you know it is currently raining at your location and the material for your project has not yet been shipped from the supplier. In addition you have changed the scope of the project. A color change was not in the agreement and will require additional cost to you. This now negates our agreement.”¹² If the Respondent had not agreed to replace the roof, he would have said so in the emails, especially the last one because the Claimant’s intervening email restated that the agreement was for a full replacement. Also, it is very difficult to believe that Mr. Sampson would not have known about the May 5 email from his secretary, informing the Claimant that the Respondent had agreed to the replacement of the roof. This is especially true because, as the email states, and consistent with other evidence in the record, the rescheduling was “coordinated” to include the Claimant’s, Respondent’s, and Union’s presence at the replacement.¹³

However, regardless of whether the Respondent agreed to replace the roof, I am satisfied that the Claimant reasonably requested and was entitled to a full replacement. The Respondent was bound by the home improvement contract to install the roof “as outlined in the manufacturers [sic] warranty requirements.” He failed to do that. The manufacturer warrants the roof for thirty years, but the warranty “**DOES NOT APPLY in the event of: . . . • In the event of deterioration of the panels caused by direct or indirect contact with fasteners. . . .**” Claimant

¹¹ The Claimant acknowledged that she changed the color of the roof because she believed that would help her easily confirm that there had been a complete replacement.

¹² The Claimant offered a print-out of the weather conditions in the in the area of her home that shows there was zero precipitation on May 17, 2014. Ms. James also testified that all the material needed to replace the roof had previously been shipped to the Claimant’s residence.

¹³ Furthermore, the Respondent did not dispute that Union provided a new roof to the Claimant at no cost. It does not make sense that Union would have done that unless it agreed that the Respondent, which it had recommended to the Claimant, had improperly installed the roof. In addition, although Mr. Sampson denied that the signature on Claimant 3 was his, the signature looks very similar to his signature on other exhibits.

10 (emphasis in the original). I have already found that the roof's panels are in direct contact with fasteners. The Claimant was entitled to have the home improvement completed in a manner that was consistent with the home improvement contract. Instead, the Respondent's unworkmanlike installation of the roof voided the manufacturer's warranty and failed to provide the Claimant with what the Respondent had promised. Under these circumstances, it was reasonable for the Claimant to insist on the replacement of the roof.

Actual Loss

The record includes the Claimant's contract with Feicht to replace the roof (labor only) at a cost of \$12,875.00. The record also includes cancelled checks from the Claimant to Feicht for that total amount in October and November 2011.

As described above, "actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Section 8-401. The total cost to replace the Respondent's inadequate and unworkmanlike home improvement was \$12,875.00.

When a homeowner "has solicited ... another contractor to complete the contract," actual loss is measured by subtracting the original contract amount from the sum of the amount paid to the original contractor plus a reasonable amount to repair the original contractor's poor work. COMAR 09.08.03.03B(3)(c). Based on this formula, the Claimant's actual loss is \$7,835.00 ($\$2,160.00 + \$12,875.00 = \$15,035.00 - \$7,200.00 = \$7,835.00$). However, under section 8-405(e)(5), "The Commission may not award from the Fund: . . . (5) an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Therefore, the Claimant's compensable actual loss is \$2,160.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained a compensable actual loss of \$2,160.00 as a result of the acts and omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(5) (2010 & Supp. 2014).¹⁴

RECOMMENDED ORDER

I recommend the following:

A. The Maryland Home Improvement Commission **ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,160.00.

B. The Maryland Home Improvement Commission **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).

C. The records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

December 9, 2014
Date Decision Issued

Michael D. Carlis
Administrative Law Judge

MDC/da
#153301

¹⁴ This is the amount recommended by counsel for the Fund.

PROPOSED ORDER

WHEREFORE, this 20th day of January 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order 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.

I. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION