

IN THE MATTER OF THE CLAIM
OF REBECCA A. CYMEK,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JAMES J. MARTIN,
t/a PROMPT RESTORATION, INC. ,
RESPONDENT

* BEFORE UNA M. PEREZ,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-13-20918
* MHIC No.: 12 (90) 499
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On June 12, 2012, Rebecca A. Cymek (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$127,684.75 for actual losses allegedly suffered as a result of a home improvement contract with James J. Martin, t/a Prompt Restoration, Inc. (Respondent).

I held a hearing on January 6, 2014 at the Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Room 110, Annapolis, Maryland. Md. Code Ann., Bus. Reg.

§§ 8-312, 8-407 (2010 & Supp. 2013). James R. Schraf, Esq., represented the Claimant. Kris

King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. Neither the Respondent nor anyone purporting to represent him appeared.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, 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. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Clm. Ex. 1 Travelers Insurance estimate of damages, entered June 27, 2010
- Clm. Ex. 2 Prompt Restoration, Inc. Agreement
- Clm. Ex. 3 Prompt Restoration, Inc. Authorization for Work, June 24, 2010
- Clm. Ex. 4 Prompt Restoration, Inc. Authorization for Work, June 25, 2010
- Clm. Ex. 5 Travelers Check #466937, \$40,473.01, payable to Citimortgage, Inc. and Hewitt Peterson, July 26, 2010
- Clm. Ex. 6 Travelers Check # 14588698, \$12,992.70, payable to Citimortgage, Inc. and Hewitt Peterson, November 29, 2010
- Clm. Ex. 7 Waynewright Construction, LLC, Engineering Report, September 2, 2011
- Clm. Ex. 8 Letter from Anne Arundel County to Wayne Cymek, October 4, 2011

- Clm. Ex. 9 Complaint to the MHIC, with attachments, October 7, 2011
- Clm. Ex. 10 Residential Evaluation for the Travelers Companies, January 3, 2012
- Clm. Ex. 11 Letter from the Claimant to the MHIC, with Claim Form, June 10, 2012
- Clm. Ex. 12 Minkoff Company, Inc. estimate for repairs, February 20, 2012, revised July 2013
- Clm. Ex. 13A-13F Copies of photographs of Claimant's house before and after June 22, 2010

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 OAH File Copy of Notice of Hearing, September 23, 2013, with attached Certified Mail "green cards"
- GF Ex. 2 Hearing Order, May 14, 2013
- GF Ex. 3 The Respondent's licensing history, printed January 2, 2014
- GF Ex. 4 Home Improvement Claim Form, filed June 12, 2012
- GF Ex. 5 Letter from the MHIC to the Respondent, June 20, 2012

No exhibits were offered on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf and presented the testimony of Duane R. Ferguson, P.E., who was accepted as an expert in construction and engineering, and Chris Havens, of the Minkoff Company, Inc., who was accepted as an expert in construction consulting and estimating.

Neither the Fund nor the Respondent presented 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 licensed individually as a home improvement contractor under MHIC license number 01-100702. His license is scheduled to expire on October 19, 2015.
2. At all times relevant to the subject of this hearing, the Claimant and her husband resided in a home on Teaberry Court in Severn, Anne Arundel County, Maryland (the Property).
3. In 2010, the Property was owned by the Claimant's father, Hewitt Peterson, as trustee of a revocable trust. Mr. Peterson resided outside the State of Maryland. The Property was encumbered by a mortgage, held by Citimortgage, Inc.
4. In 2010, the Property was insured under a policy of homeowner's insurance issued by the Automobile Insurance Company of Hartford, Connecticut, one of the Travelers group of insurance companies.¹
5. One June 22, 2010, as a result of severe weather in the area, a very large oak tree fell onto the Property, causing significant damage to portions of the home, including the roof.² The Claimant promptly reported the loss to the Travelers.
6. On June 24, 2010, Gary Gilchrist (Gilchrist), a claims adjuster, inspected the loss on behalf of the Travelers. The Travelers did not dispute coverage for the loss.
7. Gilchrist recommended the Respondent as a local contractor who did restoration work for the Travelers. The Claimant accepted the suggestion.

¹ The parties refer to the insurer simply as "the Travelers." For convenience, I will also do so in this Decision.

² Compare the photographs in Cl. Ex. 13A and B with Cl. Ex. 13C through F.

8. Gilchrist prepared an estimate of damages (Travelers Estimate) setting forth the cost of restoration and repair, broken down by the affected rooms and structural features (the roof, front and rear elevations, and concrete). Cl. Ex. 1.
9. The total Replacement Cost Value (RCV) of the line items was \$55,318.36. Service charges, overhead, profit and sales tax brought the total to \$74,841.19. Cl. Ex. 1.
10. On or about June 24, 2010, the Respondent agreed to perform the restoration and remodeling work set forth in the Travelers Estimate.
11. On June 24, 2010, the Claimant, on behalf of Mr. Peterson, signed an authorization for the Respondent to perform the restoration work. Cl. Ex.3.
12. On June 25, 2010, the Claimant's husband also signed an authorization. Cl. Ex. 4.
13. The Respondent performed work on the Property beginning in or about July 2010.
14. On or about July 26, 2010, the Travelers issued a check for \$40,473.01, payable to Hewitt Peterson and Citimortgage, Inc. Both payees endorsed the check, and it was deposited in the Respondent's bank account. Cl. Ex. 5.
15. There came a time when Mr. Peterson gave the Claimant a Special Power of Attorney to act on his behalf in connection with the restoration project.
16. On or about November 29, 2010, the Travelers issued a check for \$12,992.70, payable to Hewitt Peterson and Citimortgage, Inc. Both payees endorsed the check,³ and it was deposited in the Respondent's bank account. Cl. Ex. 6.
17. The Travelers thus paid the Respondent \$53,465.71 on behalf of the owner of the Property.
18. The Respondent's work on the restoration project was sporadic and plagued by delay.

³ The Claimant endorsed this check in her capacity as Power of Attorney for Mr. Peterson.

19. The Respondent last performed work on the Property in July 2011. Because of problems with the job, the Travelers discharged the Respondent in mid-July, 2011.
20. On July 22, 2011, Joshua Nicodemus, P.E., of Waynewright Construction, LLC, inspected the Property on behalf of the owner. Mr. Nicodemus's report, dated September 2, 2011, documented several defects in the restoration work performed by the Respondent, with particular reference to the interior of the roof structure. Cl. Ex. 7.
21. Sometime in mid-September, 2011, a meeting took place at the Property, at which the Respondent was present. Another contractor⁴ pointed out the defects in the job to the Respondent. The Respondent never offered to correct the deficiencies.
22. On September 29, 2011, Brett Cannon, a building inspector for Anne Arundel County, inspected the work done by the Respondent on the roof of the Property. Mr. Cannon identified several areas of concern, including but not limited to the ridge beam, the roof rafters, and the roof trusses. Cl. Ex. 8.
23. On October 7, 2011, the Claimant filed a Complaint with the MHIC, describing in detail the history of the job, the problems with the Respondent's work, and the inconvenience suffered by the residents of the Property. Cl. Ex. 9.
24. On or about December 12, 2011, the Travelers retained Duane Ferguson, P.E., of Scientific Expert Analysis (S-E-A), to inspect the Property and the work that the Respondent had performed. Mr. Ferguson visited the Property on December 14, 2011.
25. In his report (Cl. Ex. 10), Mr. Ferguson identified major deficiencies in the restoration work performed by the Respondent, including but not limited to:

⁴ The Claimant identified this individual as Matthew Rice, of Distinctive Renovations.

- The garage roof framing, specifically the ridge beam and the trusses, did not meet code and was structurally unsound;
 - The door between the laundry room and the home office was skewed, would not close, and was attached with the wrong kind of screws;
 - Siding was not completely installed or was poorly finished, without proper trim;
 - The floor of the new concrete patio was “wavy” at the control joint;
 - The support column for the patio was not properly secured or supported, and was resting directly on masonry;
 - The “rake trim” on the new roof was uneven and poorly constructed; and
 - Some sections of roof flashing were installed with exposed fasteners, which could permit water to get in.
26. The Claimant showed Mr. Ferguson some damage to the family room ceiling and hardwood flooring that Mr. Ferguson attributed to water leakage through the roof.
27. Mr. Ferguson also identified some property damage caused by the Respondent, particularly damage to a retaining wall along the driveway and to adjacent paving.
28. The damage to the family room was caused by the tree impact but was not included in the original scope of work or paid for by the Travelers.
29. On or about February 20, 2012, Chris Havens, Director of Consulting for the Minkoff Company, Inc. (Minkoff), inspected the Property on behalf of the Travelers. Minkoff prepared an estimate of the cost of repairing and completing the work performed by the Respondent. The total, with overhead, profit and sales tax, was \$107,339.91. Cl. Ex. 12.
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30. The line item total, exclusive of overhead, profit, and sales tax, was \$83,547.70. Of that, \$2,916.93 was attributable to the family room, and \$8,350.88 was attributable to the

driveway and retaining wall. Cl. Ex. 12 at 10. Except for these two items, the estimated repairs were all necessitated by the Respondent's poor workmanship.

31. The Claimant's actual loss, rounded to the nearest dollar, is at least \$50,905.00.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent him appeared. On September 23, 2013, the OAH sent a Notice of Hearing (Notice) by certified and regular first class mail to the Respondent's last business address of record, 6675 Business Parkway, Suite D, Elkridge, MD 21075. GF Ex. 1; *see also* GF Ex. 3. The Notice advised the Respondent of the time, place and date of the hearing. The Notice further specified that failure to appear at the hearing could result in an adverse decision against the non-appearing party. The United States Postal Service (USPS) returned the certified mail "green card" with a signature showing receipt of the item at that address on September 25, 2013. GF Ex. 1. The USPS did not return the regular mail copy of the Notice.

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice shall be sent by certified mail to "the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (Supp. 2013). The procedures for notice applicable to disciplinary proceedings also apply to claims against the Fund. *Id.* § 8-407(a) (2010). Indeed, a claim against the Fund can be joined with a disciplinary proceeding based on the same facts. *Id.* § 8-408(a) (2010).

The OAH sent the Notice by certified mail to the Respondent's business address of record, as required by section 8-312(d) of the Business Regulation Article. The certified mail

copy of the Notice was received by or on behalf of the Respondent at that address. Upon the showing by the Fund, I determined that service was proper and that the Respondent had notice of the hearing.⁵ Consequently, I directed that the hearing proceed in the Respondent's absence under section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07.

Applicable Law

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. 2013). *See also* COMAR 09.08.03.03B(2). The statutory term "owner" includes "a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." Md. Code Ann., Bus. Reg. § 8-101(k) (2010). Thus, the Claimant is an "owner" for purposes of a claim against the Fund. 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 restoration contract with the Travelers, for the benefit of the Claimant.

Second, the evidence is overwhelming that the Respondent performed an unworkmanlike, inadequate and incomplete home improvement. As is evident from Cl. Ex. 13, the Property suffered significant damage when a huge oak tree fell on it in June 2010. The homeowners'

⁵ ~~When notice has been provided in the manner required by statute or regulation, the party to whom the notice has been directed has no legitimate claim that the notice given was inadequate or defective. *State v. Barnes*, 273 Md. 195, 210 (1974). Under Maryland law, there is a presumption of delivery and receipt of mail that arises upon a showing that material is properly mailed. *Brenner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996); *Border v. Grooms*, 267 Md. 100, 104 (1972).~~

insurer, the Travelers, promptly accepted liability and assigned an adjuster to inspect the damage and estimate the cost of restoring the Property to its pre-occurrence condition. According to the Claimant, the Travelers recommended the Respondent as a contractor it had worked with before. She accepted the recommendation, especially since the Respondent was located fairly close to the Property. The Travelers engaged the Respondent shortly after the occurrence.

The Travelers Estimate showed that the cost of restoration was \$74,841.19, including overhead, profit, and material sales tax. There is no dispute that as of November 2010, the Travelers had paid the Respondent \$53,465.71 on behalf of the owner of the Property.

The Claimant presented the expert testimony of Duane Ferguson, P.E., and Chris Havens of Minkoff. Both these experts were firm in their opinions that the Respondent's work was unworkmanlike, inadequate, and incomplete, with particular reference to major structural elements such as the roof, the concrete patio, the siding, flashing, and numerous other items. I found their opinions persuasive, especially in light of the photographs included in Mr. Ferguson's report. I note also that although Mr. Nicodemus of Waynewright Construction and Mr. Cannon of Anne Arundel County did not testify, their reports were consistent with, and supported, the opinions expressed by the testifying experts.

The Respondent did not appear at the hearing to offer any evidence to rebut the experts' opinions. There is no evidence that he ever provided a written response to the MHIC's letter of June 20, 2012, transmitting the Claimant's claim. Nor is there any evidence that the Respondent made any attempt to cure the deficiencies in his company's work, even though the Claimant offered him that opportunity in mid-September 2011. It is undisputed that the Travelers fired the Respondent in mid-July 2011, as a result of delays and problems reported by the Claimant, and thereafter retained S-E-A to perform an objective assessment of the situation.

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).

In this case, before computing the actual loss, I note that two items contained in the Minkoff estimate of \$83,547.70 must be omitted. The first is the \$2,916.93 attributable to repairs to the family room. *See* Cl. Ex. 12 at 10. Mr. Ferguson testified that the damage to the ceiling and the hardwood floors was caused by water and that the damaged area was right below the tree impact. His report characterized this damage as "caused by the tree but not reported." *See* Cl. Ex. 10 at 24, 30. Mr. Havens agreed that this damage was not reported initially, was not included in the Travelers estimate, and was not paid for by the Travelers.⁶ Therefore, I have excluded the \$2,916.93.

⁶ Indeed, the only reference to the family room in the Travelers Estimate is \$130.23 for cleaning and deodorizing the carpet. Cl. Ex. 1 at 6.

The second item that must be omitted is the \$8,350.88 attributable to the driveway. *See* Cl. Ex. 12 at 10. The Claimant's testimony was quite clear that the Respondent's operations damaged the retaining wall along the driveway and the adjacent paving. *See* Cl. Ex. 10 at 34. This damage was not caused by the falling tree, and repairs to the wall and/or driveway were not part of the initial loss accepted by the Travelers. While unfortunate, the costs for these repairs are in the nature of consequential damages and are not recoverable from the Fund. Therefore, I have also excluded the \$8,350.88. Rounding the numbers to the nearest dollar, these two deductions, totaling \$11,268.00, reduce the Minkoff estimate to \$72,280.00 (\$83,548.00-\$2,917.00-\$8,351.00 = \$72,280.00).

Applying the formula set forth in COMAR 09.08.03.03B(3)(c), using rounded numbers, the Fund argued that the Claimant's actual loss should be calculated as follows:

Amount paid to the Respondent	\$53,466.00
Minkoff Estimate of Repair Costs	<u>+\$72,280.00</u>
Total	\$125,746.00
Minus original contract price	<u>- \$74,841.00</u>
Actual loss	\$50,905.00

In its recommendation, the Fund identified the original contract price as \$74,841.19, a figure that includes overhead, profit, material sales tax, and other charges. *See* Cl. Ex. 1 at 11. The Fund identified the estimated cost of repair, before the deduction of the costs for the family room and the retaining wall and driveway, as \$83,547.70. This figure does *not* include overhead, profit, or material sales tax. *See* Cl. Ex. 12 at 9.

The Fund did not explain why it did not include overhead, profit, and material sales tax in the estimated cost of repair; this may have been an oversight. The total Minkoff estimate of

\$107,339.91, rounded to \$107,340.00, minus \$11,298.00, equals \$96,042.00. If this figure is used instead of \$72,280.00, the calculation would be as follows:

Amount paid to the Respondent	\$53,466.00
Minkoff Estimate of Repair Costs	<u>+\$96,042.00</u>
Total	\$149,508.00
Minus original contract price	<u>-\$74,841.00</u>
Actual loss	\$74,667.00

Regardless of which figure is used as the estimated cost of repair, however, the Claimant is entitled to only a portion of the actual loss (whether it is \$50,905.00 or \$74,667.00) 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 the Claimant to the Respondent. Md. Code Ann., Bus. Reg. §8-405(e)(1) and (5) (Supp. 2013). The Travelers, on behalf of the Claimant, paid the Respondent \$53,466.00. The Claimant's actual loss, computed using the formula noted in COMAR 09.08.03.03B(3)(c), substantially exceeds \$20,000.00. Hence, the Fund recommended, and I find the Claimant entitled to, reimbursement in the amount of \$20,000.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of at least \$50,905.00 as a result of the Respondent's acts and omissions, of which \$20,000.00 is compensable by the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2010 & Supp. 2013).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$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

March 6, 2014
Date Decision Issued

Una M. Perez
Administrative Law Judge

UMP/da
147801

PROPOSED ORDER

WHEREFORE, this 25th of April 2014, 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.

Jeffrey Ross
Jeffrey Ross
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION