

**IN THE MATTER OF THE CLAIM  
OF DIANE L. COOK,  
CLAIMANT,  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF THERESA M.  
MESSERSMITH,  
T/A MESSERSMITH HOME  
IMPROVEMENTS,  
RESPONDENT**

**\* BEFORE JEROME WOODS, II,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-HIC-02-13-20849  
\* MHIC NO.: 13 (75) 235  
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**PROPOSED DECISION**

**STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER**

**STATEMENT OF THE CASE**

On October 4, 2012, Diane L. Cook, (Claimant), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses allegedly suffered as a result of a home improvement contract with Theresa M. Messersmith, t/a Messersmith Home Improvements (Respondent).

I held a hearing on April 9, 2014 at the Cumberland, Maryland office of the Office of Administrative Hearings (OAH). Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). Chris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Jeff Getty, Esquire represented the Claimant. Stephen Poirier, Esquire, represented the Respondent.

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 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.

### **ISSUE**

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I attached an exhibit list to this Proposed Decision.

#### **Testimony**

The Claimant testified in support of her Claim and presented the testimony of Bruce Firlie, recognized as an expert in roofing construction.

The Respondent testified and presented testimony from the following witnesses:

1. David E. Mackereth, recognized as an expert in roofing construction; and
2. Arlin Messersmith, Respondent's husband.

The Fund presented no witnesses.

## 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 #77491.
2. The Claimant owns a double-wide trailer home located at 15352 Lower Town Circle Road, Oldtown, Maryland 21555 (Property).
3. In May 2011, the Claimant's property was damaged by hail. Specifically, the roof, sky light, kitchen and walls sustained water damage as a result of the hail storm.
4. Travelers Insurance paid the Respondent for the damages sustained to the interior of her Property as a result of the hail storm. This amount was paid prior to the Respondent working on the Property.
5. The Claimant hired someone to temporarily seal the broken skylights before she entered into a contract with the Respondent to fix her damaged roof.
6. On June 13, 2011, the Claimant and the Respondent entered into a written contract to install a new roof over top of the existing roof. (Contract). The Contract also called for the Respondent to "close two skylights, install new insulation in opening, install plywood on roof and install twenty year shingles." (Cl. Ex. 1).
7. The original agreed upon contract price was \$4,836.00.
8. On June 23, 2011, the Claimant paid the Respondent \$1,500.00 by check and \$1,500.00 by cash. The remaining balance of \$1,836.00 was due at the completion of the work.
9. The work began on or about July 6, 2011. The work was supervised by the Respondent's husband, Arlin Messersmith. Mr. Messersmith is the person who

drafted the Contract on behalf of the Respondent.

10. Mr. Messersmith indicated on the contract that the Claimant had a balance of \$1,836.00.
11. On or about the second week of July 2011, the Respondent completed the work.
12. Approximately one to two weeks after the Respondent completed the work, the roof leaked after the first rain.
13. The work performed by the Respondent contained the following defects: no ridge vent present on roof, shingles improperly hung (no starter shingle, overhanging shingles), improper placement of nails (nails in tar line), and improper seals.
14. The leaky roof caused condensation and water damage to the interior walls, including bedroom, kitchen and family room, as well as the plywood and ceiling under the roof.
15. Once the roof began leaking, the Claimant called Bruce Firlie, the owner and operator of JLD Construction to look at the roof. Mr. Firlie has completed hundreds of roof repairs over a career of thirty years in the construction industry.
16. On July 17, 2011, Mr. Firlie went to the Property and looked at the roof. Mr. Firlie climbed on the roof, took pictures of the roof, and examined the roof shingles installed by the Respondent.
17. Subsequent to Mr. Firlie's visit, the Respondent sent her husband to the Property to make repairs to the roof. After Mr. Messersmith cut some overhung shingles, the roof continued to leak whenever it rained.
18. The Contract contains an arbitration clause. No efforts were made by the Respondent to pursue arbitration, and the Respondent waived the arbitration

clause.<sup>1</sup>

19. After the Respondent's attempted repairs to the roof were unsuccessful, the Claimant did not contact the Respondent to make any additional repairs.
20. As a result of the leaks, improper installation of roof and nail holes in the roof, the roof has to be replaced.
21. On February 22, 2014, the Claimant obtained an estimate from All Superior Roofing.
22. In order to correct the Respondent's work, All Superior Roofing would have to perform the following:
  - Remove existing roof, install drip edge flashing;
  - Install weather watch underlayment on edges and flashing;
  - Install armor underlayment;
  - Replace vent pipe collars, louvers;
  - Install shingles/seal-a-ridge cap;
  - Clean and secure gutters;
  - Clean and remove debris; and
  - Install vent.
23. The total cost of the repairs is \$6,840.00.
24. The Claimant's actual loss is \$5,004.00 ( $\$3,000.00 + \$6,840.00 - \$4,836.00$ ).
25. The Respondent's insurance company (Frederick Mutual Insurance Company)

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<sup>1</sup> Bus. Reg. § 8-405(c) provides: "Agreement for arbitration. – A claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the Fund." No such request was made in this case and arbitration is not an issue.

issued payment to the Claimant for the consequential damages to the interior of her home after it found the Respondent to be “negligent” with regard to the work performed on the Property. (Resp. Ex. 1).

### 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.2013). *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 she entered into the Contract with the Claimant.

Second, the Respondent performed inadequate home improvement work at the Property. It is undisputed that the Claimant hired the Respondent to build a roof over top of an existing roof on the Claimant’s double wide trailer home. It is also undisputed that after the Respondent’s work, the Claimant called the Respondent to come back to the Property because the new roof leaked after the first rain storm subsequent to the roof installation.

Third, the Respondent performed unworkmanlike and inadequate home improvement by improperly installing the roof. Bruce Firlie, the Claimant’s expert, who examined the Respondent’s work at the request of the Claimant, convincingly testified that the Respondent did not install venting and shingles properly, causing leaks and other defects. Mr. Firlie offered that shingles were over hung, and nails were installed over the tar line instead of one half inch above the line in accordance with industry standards. Even the Respondent’s expert, David E.

Mackereth, acknowledged that the nails installed by the Respondent were not installed consistent with trade standards and that the roof should have had proper venting to lessen condensation which could lead to water damage. Additionally, proper venting was not installed, nails were driven too deep by the Respondent's worker, with the use of a nail gun, which caused holes and leak sources which led to condensation and water damage. Moreover, Mr. Messersmith testified that none of the materials used to install the roof were defective. As a result, I am compelled to believe that the improper installation must be attributed to the work performed by the Respondent's agent.

Given the numerous defects, and water damage indicated in the Claimant's photographs, I agree with Mr. Firlie and for those reasons gave his testimony more weight than the Respondent's expert who opined that the nail holes may not have made a difference with regard to the leaks. The water damage depicted in the photographs was caused after the Respondent performed the initial work and had nothing to do with the hail storm that took place prior to the work. Even the Respondent's own insurance company believed the Respondent was negligent when installing the roof and as a result, paid for the consequential damages to the interior of the Claimant's home.

I conclude that the Respondent performed inadequate home improvement work at the Property. The Claimant engaged the Respondent's services because her roof was leaking. The Respondent performed services which did not adequately fix the roof, and after attempting to make repairs to the initial work, the roof still leaked. Further, the repairs were not made in accordance with industry standards.

Having found eligibility for compensation, I now turn to the amount of the award. 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).

Using this formula, the Claimant's actual loss is \$5,004.00 calculated as follows:

Amount paid to the Respondent	\$3,000.00
Amount required to correct the inadequate work	<u>+\$6,840.00</u>
Total	\$9,840.00
Contract price	<u>-\$4,836.00</u>
Actual loss	\$5,004.00

However, Under Business Regulation § 8-405(e)(5) (Supp. 2013), the amount of an award to a claimant is limited to the amount the claimant paid the contractor whose work was inadequate, incomplete, or unworkmanlike.

The Claimant paid \$3,000.00 to the Respondent, which is less than her actual loss computed using the formula noted in COMAR 09.08.03.03B(3)(c). Hence, the Claimant is entitled to reimbursement in the amount of \$3,000.00 from the Fund.



**CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual/compensable loss of \$3,000.00 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).

I further conclude that the Claimant's recovery from the Fund is limited to \$3,000.00, the amount she paid the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5) (Supp. 2013).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,000.00; 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**

June 25, 2014  
Date Decision Issued

JW/ac  
# 150040

Jerome Woods, II  
Administrative Law Judge 

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF DIANE L. COOK,</b></p> <p><b>CLAIMANT,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF THERESA M.</b></p> <p><b>MESSERSMITH,</b></p> <p><b>T/A MESSERSMITH HOME</b></p> <p><b>IMPROVEMENTS,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE JEROME WOODS, II,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>* OAH NO.: DLR-HIC-02-13-20849</b></p> <p><b>* MHIC NO.: 13 (75) 235</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p>
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**FILE EXHIBIT LIST**

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

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| Clam. Ex. 1 | Contract between Claimant and Respondent, June 13, 2011      |
| Clam. Ex. 2 | Check paid to Respondent, June 23, 2011                      |
| Clam. Ex. 3 | Color photographs of interior walls and ceilings, March 2014 |
| Clam. Ex. 4 | Superior Roofing contract/estimate, September 27, 2014       |
| Clam. Ex. 5 | Color photographs of Claimant's roof, July 2011              |

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

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|------------|-------------------------------------|
| Fund Ex. 1 | Notice of hearing, February 6, 2014 |
|------------|-------------------------------------|

- Fund Ex. 2            MHIC Hearing Order, May 9, 2013
- Fund Ex. 3            MHIC licensing history for Respondent
- Fund Ex. 4            Claim, January 2, 2012
- Fund Ex. 5            Letter from MHIC to Respondent, October 5, 2012

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

- Resp. Ex. 1            Frederick Mutual Insurance Company verification of payments,  
September 14, 2012