

On October 2, 2015,¹ I conducted a hearing in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).² The Claimant represented herself. Rebekah Lusk, Esquire, represented the Respondent, who was present. Peter Martin, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), COMAR 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so,
2. What is the amount of the loss?

SUMMARY OF THE EVIDENCE

Exhibits³

A complete exhibit list is attached as an appendix.

Testimony

The Claimant testified and she presented the testimony of Brian Bramel, Ph.D., whom I accepted as an expert in Civil, Mechanical and Structural Engineering. The Respondent testified

¹ The matter was originally scheduled for hearing on July 20, 2015, but as of that date, the Claimant had a matter pending against the Respondent in the District Court of Maryland for Anne Arundel County. In accordance with the provision found at Section 8-408(b) (2015) of the Business Regulation Article, I issued an Order of Stay on July 22, 2015, pending the resolution of the District Court proceeding. On September 11, 2015, the MHIC issued an Order to Vacate Stay after the Claimant demonstrated she filed a Notice of Dismissal of the District Court proceeding.

² Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

³ Any gap in the numbering of exhibits represents an exhibit which was marked for identification during a witness' testimony, but was never offered into evidence. Where an exhibit was offered into evidence, but an objection was made to its admission and the objection was sustained, the exhibit was retained by me to preserve the record, but I did not review the exhibit in rendering this decision. I have designated exhibits in this class in the exhibit list as "Not Admitted."

and he did not present any other witnesses. The Fund presented argument but no testimonial evidence.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was licensed by the MHIC as a home improvement contractor under registration number 148521.
2. On or around October 7, 2011, the Claimant entered into a contract with the Respondent for the Respondent to replace portions of the roof at the Claimant's residence located in Severn, Maryland (the Property).
3. The Property was built in 1998. The Claimant moved into the Property sometime in November 2006. At the time the Claimant and her husband purchased the Property, there was a leak evident in the second bedroom. The Claimant had the leak repaired prior to moving into the Property.
4. Between November 2006 and January 12, 2012, the Property did not have any leaks.
5. Sometime in late summer/early fall of 2011, the Claimant's husband⁴ decided the Property's roof needed to be replaced. The Claimant and her husband contacted the Respondent to perform the work.
6. The contract price was \$19,000.00, which the Claimant and her husband paid in full.
7. The roof at the Property is unusual. It consists of five sections, three of which are flat and two of which are sloped with terra cotta tile covering. The Respondent was contracted to perform the replacement on the three flat sections of the roof.
8. The Respondent hired FBT Contractors, Inc. (FBT) as the subcontractor that would perform the roof work.

⁴ The Claimant's husband has since passed away.

9. Under the contract, the Respondent, through FBT, was to perform the following work on the flat sections of the roof:

- Remove all existing roofing⁵ and underlayment down to the wood deck and haul away all debris
- Inspect sheeting and replace it where deteriorated, at an extra cost of \$45.00 per sheet of plywood
- Install new tapered Styrofoam insulation board system to allow water to flow properly to the drain system
- Install a new mule hide 0.60 ml, 15-year, fully adhered white reflective TPO⁶ roof materials 9" up to the parapet wall with termination bar
- Flash all plumbing vent pipes with new TPO unsupported membrane

10. The flat sections of the roof covered the master bedroom, the dining room, the kitchen, and the smaller, second bedroom.

11. FBT removed the existing EDPM membrane on the flat sections of the roof and replaced it with TPO membrane. In installing the TPO membrane, FBT installed the TPO in such a manner that its termination point was higher than the existing flashing⁷ which was installed with the previous EDPM membrane. FBT did not install flashing at the TPO membrane's termination point. As a result of the gap between the existing flashing and the termination point of the TPO membrane, water is able to seep into the roof when it rains.

12. FBT completed the roof work sometime before the end of 2011.

⁵ The existing roof structure included an EDPM membrane, which is a sheet product placed on the surface of a roof and designed to prohibit water from penetrating to the under-structure of a roof. It is an alternative to shingles. (See Resp. Ex. 6 as an example of what the EDPM membrane looks like.)

⁶ A TPO membrane is simply a different type of membrane from an EDPM. (See Cl. Ex. 1 and Resp. Ex. 5 as examples of what the TPO membrane looks like.)

⁷ "Flashing" is the name given to thin pieces of a material impervious to water penetration that are installed into a structure from a joint or as part of a weather resistant barrier.

13. On or around January 20, 2012, the Claimant noticed a leak in her kitchen after a heavy rainfall. The leak continued in the kitchen throughout 2012 whenever there was heavy rainfall.
14. On or around October 29, 2012, leaks appeared in the master and second bedrooms at the Property. During heavy rainfall, the ceilings in those rooms leak.
15. On June 6, 2014, there was a severe leak in the master bedroom, the bathroom in the master suite, and in the second bedroom. On that date, water seeped into the house at such a steady pace it caused the drywall in the master bedroom to bulge.
16. On or around September 24, 2014, leaks appeared in the dining room; the ceiling in that room leaks whenever there is heavy rainfall.
17. Leaks still occur at the Property in the master and second bedrooms, the kitchen and the dining room whenever there is unusually heavy rainfall.
18. The Claimant contacted the Respondent in January 2012 to complain about the leak in the kitchen. The Respondent repaired the drywall.
19. The Claimant contacted the Respondent again in June 2014 after the incident on June 6, 2014. After conducting an inspection, the Respondent cleaned out and enlarged the roof scuppers.⁸ The Respondent also hired subcontractors to extract the water from the master bedroom and to replace the carpet. The Respondent re-painted the master bedroom, but did not complete the re-painting of the master bathroom or the second bedroom.
20. On or around August 11, 2014, the Claimant obtained an estimate from Nexterior Contracting, LLC (Nexterior), MHIC #105773, for Nexterior to remove and replace the existing TPO roofing material. Nexterior's estimate totaled \$25,312.00.

⁸ A scupper is a hole deliberately cut into a portion of a flat roof which operates as a secondary drainage system.

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); *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. The Claimant bears the burden of proof by a preponderance of the evidence to show entitlement to an award from the Fund. COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimant has proven eligibility for compensation.

There is no dispute in this case about the following elements of the claim: the Respondent was a licensed home improvement contractor at the time he and the Claimant contracted for the Respondent to perform work at the Property; the Property is the Claimant’s primary residence; and the Respondent, through his subcontractor, performed the work. The Respondent’s decision to hire a subcontractor to perform the roof work does not absolve the Respondent of responsibility if that work was performed in an inadequate or unworkmanlike manner. Business Regulation Article § 8-405(b) specifically provides that “[for] purposes of recovery from the Fund, the act or omission of a licensed contractor *includes the act or omission of a subcontractor*, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists” (emphasis supplied). Based on the evidence, I find the roof work was inadequately performed.

The Claimant presented Dr. Brian Bramel, whom I accepted as an expert in Civil, Mechanical and Structural Engineering. Dr. Bramel was a very knowledgeable and thorough witness. He personally inspected the Property in August 2014, and he was able to clearly articulate the problems with the installation of the TPO membrane. Specifically, Dr. Bramel

indicated the membrane should have been installed in a manner where its elevation was either (1) equal to the elevation of the existing flashing, or (2) high enough to join the cap flashing⁹ at the top of the roof's parapet wall. In Dr. Bramel's opinion, it was not appropriate for the TPO membrane to be installed at a higher elevation than the existing flashing, particularly when the Respondent failed to install any flashing at the TPO membrane's termination point. Dr. Bramel noted the membrane was secured to the existing structure with caulking material, which is not suitable as long term flashing for outdoor elements. In the absence of proper flashing at the membrane's termination point, there was nothing to prevent water from seeping into the space between the TPO membrane's termination point and the existing structure. In Dr. Bramel's opinion, this failure of installation is the proximate cause of the leaks.

Alternatively, Dr. Bramel explained, the TPO membrane should have been extended so that it terminated at the cap flashing which sits atop the parapets. In Dr. Bramel's opinion, it is unlikely leaks would have occurred had the TPO membrane been installed in this fashion. As Dr. Bramel explained, the Respondent had a duty to integrate the new TPO membrane into the existing roof structure in a manner designed to reduce or ameliorate entirely water seepage into the roof's substructure and, thus, into the Property; the Respondent failed in that duty.

It must be noted the Respondent acknowledged that he knew the TPO membrane should have been extended all the way up the parapet wall to the cap flashing. On cross-examination, he indicated he suggested installing the membrane in this fashion to the Claimant's husband, but the Claimant's husband did not want to do that because of the cost. Additionally, the Respondent acknowledged he did not personally supervise FBT's work as the work was being performed.

⁹ Cap flashing is a thin sheet of impervious-to-water material that is placed atop a wall and designed to force water to shed from the top of the wall instead of running down the wall. The parapets at the Property have cap flashing. (See Cl. Ex. 1.)

I am mindful that the Claimant's husband apparently ruled out what was arguably the best practice for the TPO membrane installation because of the cost. This does not, however, relieve the Respondent of the obligation to nevertheless perform the roof installation in an adequate and workmanlike manner. As discussed above, the Respondent inadequately installed the TPO membrane when he did not ensure proper flashing was in place to address the difference in elevation between the membrane's termination point and the existing structure. This inadequate installation is the cause of the leaks at the Property, which are all observed in rooms that are covered by the flat sections of the roof.

I am not persuaded by the Respondent's suggestion that a faulty chimney cap might be to blame for the leaks at the Property. According to the Respondent, the Claimant called him in December 2011 to complain about a leak in the master bedroom. The Respondent investigated and determined the chimney cap was faulty. He did not explain how the chimney cap was faulty, or how its flaws contributed to the leak in the master bedroom, but he testified he had a new one fabricated and replaced the old one. Presumably, the new chimney cap corrected the fault of the old one, yet the Claimant still experienced leaks in the master bedroom subsequent to December 2011. I find it more likely than not, given this fact, that the chimney cap was not the culprit.

I am equally unpersuaded by the December 18, 2014 letter over the signature of Dominic Catanzaro of Catanzaro Engineering, Inc., which was admitted as Respondent Exhibit 16 and which the Respondent urged me to consider as an alternate explanation for the leaks at the Property. Mr. Catanzaro did not testify before me, so there was no opportunity for him to be questioned about the bases of his statements, nor was there a possibility to present to him Dr. Bramel's alternate theory of causation to determine if Mr. Catanzaro found it to be reasonable. Additionally, Mr. Catanzaro was not present to be qualified as an expert, nor was a copy of his

IN THE MATTER OF	* BEFORE LATONYA B. DARGAN,
THE CLAIM OF CORA GRAY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT COMMISSION	* OAH Case No.: DLR-HIC-02-15-03916
GUARANTY FUND	* MHIC No.: 14 (90) 1189
FOR THE ACTS OR OMISSIONS OF	*
FREDERIK MUELA, JR.,	*
RESPONDENT,	*
t/a LIBERTY WINDOWS AND	*
SIDING, INC.	*

* * * * *

APPENDIX

- I admitted the following exhibits for the Claimant:
- Cl. #1: Photographs taken by Ernest Gray
 - Cl. #2: Photographs taken by Cora Gray
 - Cl. #3: The October 7, 2011 Contract
 - Cl. #4: August 11, 2014 Proposal, Nexterior Contracting, LLC
 - Cl. #5: May 16, 2014 Invoice, Michael and Son Services
 - Cl. #6: Not Admitted
 - Cl. #7: Not Admitted
 - Cl. #8: Photographs taken by Mike Cook
 - Cl. #9: Architectural drawings of the Property

I admitted the following exhibits for the Respondent:

Resp. #4: October 3, 2011 contract between Respondent and FBT Contractors, Inc.

Resp. ##5-9: Photographs

Resp. #10: December 10, 2011 Invoice, Herman Flora & Son Sheet Metal

Resp. #11: Photograph

Resp. #12: May 29, 2014 Invoice, Healthy Home Restorations

Resp. #13: June 3, 2014 Invoice, Francesco Cardenas

Resp. #14: Contractors Invoice, June 5, 2014

Resp. #15: Calvin Page's January 28, 2015 letter to the Claimant

Resp. #16: Dominic Catanzaro's December 18, 2014 letter to Calvin Page

I admitted the following exhibits for the Fund:

Fund #1: April 22, 2014 Notice of Hearing

Fund #2: July 22, 2015 Proposed Order of Stay

Fund #3: September 11, 2015 Order to Vacate Stay

Fund #4: July 27, 2014 Notice of Hearing

Fund #5: The Respondent's MHIC licensing history

Fund #6: The MHIC's August 19, 2014 letter to the Respondent

curriculum vita presented to me so I could determine if, based on his professional qualifications, his statements could be accepted as the opinions of an expert. In the absence of any such qualification of Mr. Catanzaro as an expert in Engineering or anything else, I give no weight to the information contained in his December 18, 2014 letter, particularly as that letter contains his opinion as to the cause of the leaks. I find Dr. Bramel's explanation as to causation to be plausible and reasonable, and it has not been satisfactorily refuted by the Respondent.

Having found that the Claimant is eligible 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)(a), (b) and (c). 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).

Applying the formula set out above leads to the following result:

Amount Paid to the Respondent	\$ 19,000.00
Amount Paid to Correct or Complete Work	<u>+\$ 25,312.00</u>
	\$ 44,312.00
Amount of Original Contract	<u>-\$ 19,000.00</u>
Amount of Actual Loss	\$ 25,312.00

Under Business Regulation § 8-405(e)(5), 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. Accordingly, I find the Claimant sustained an actual loss totaling \$19,000.00.

PROPOSED CONCLUSION OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Claimant suffered an actual loss of \$19,000.00, and she is entitled to be compensated in the amount of \$19,000.00 as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg.

§§ 8-401, 8-405(e)(5); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$19,000.00; 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); and,

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

Signature on File

December 10, 2015
Date Decision Mailed

Latonya B. Dargan / MKS
Administrative Law Judge

LBD/kkc
#159541

PROPOSED ORDER

WHEREFORE, this 28th day of January, 2016, 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.

Joseph Tunney

Joseph Tunney

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION

El
ge

FREDERICK MUELA, JR., t/a
LIBERTY WINDOWS AND SIDING, INC.

Petitioner

v.

MARYLAND HOME IMPROVEMENT
COMMISSION

and

ERNESCO R. OLIVER
(Personal Representative
Estate of Cora Gray)

Respondents

* IN THE CIRCUIT COURT
* FOR HOWARD COUNTY

* Case No. 13-C-16-106985 AA

ENTERED

AUG 25 2016

CLERK, CIRCUIT COURT
HOWARD COUNTY

* * * * *

ORDER

On this *24th* day of *August*, 2016, this Court ORDERS that the decision of
the Maryland Home Improvement Commission dated December 10, 2015 is **AFFIRMED**.

Signature on File

JUDGE 0

TRUE COPY TEST:

Wayne A Rabej
Clerk

13000