



DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

October 4, 2018

Debra Britton
7242 Millcrest Terrace
Derwood, MD 20855

RE: Complaint/Claim: 14 (05) 1248

Dear Debra Britton:

The Maryland Home Improvement Commission has completed adjudication of a total of 11 Guaranty Fund claims against contractor Richard Stearns t/a Honest Exteriors. The awards in those 11 cases total \$106,008.14.

As you were previously advised, under the Maryland Home Improvement Law, the Commission may not pay a total of more than \$100,000.00 in Guaranty Fund Claims against any one contractor. Because the total of the approved claims exceeds the \$100,000.00 limit, it is necessary for the Commission to pay the claims on a "pro-rated" percentage basis. Based on the total award amount of \$106,008.14 and the \$100,000.00 payment limit under the law, the Commission may pay 93.85% of each approved claim award.

You will receive a *pro-rated* payment from the Guaranty Fund totaling 93.85% of your approved claim award. Therefore, you will receive a payment in the amount of \$4,409.64.

Please allow six (6) to eight (8) weeks from the date of this letter to receive the award from the State Treasury. If you have any questions concerning this matter, please feel free to contact this office at 410-230-6178.

Very truly yours,

Keyonna Penick

Keyonna Penick
Panel Specialist
Maryland Home Improvement Commission

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
INTERNET: WWW.DLLR.MARYLAND.GOV • E-MAIL: DLOPLMHC-DLLR@MARYLAND.GOV

LAWRENCE J. HOGAN JR, GOVERNOR • BOYD K. RUTHERFORD, LT. GOVERNOR • KELLY M. SCHULZ, SECRETARY

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DEBRA BRITTON,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF RICHARD STEARNS,</p> <p>T/A HONEST EXTERIORS,</p> <p>RESPONDENT</p>	<p>* BEFORE RICHARD O'CONNOR,</p> <p>* ADMINISTRATIVE LAW JUDGE,</p> <p>* THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-16-24430</p> <p>* MHIC No.: 14 (05) 1248</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 25, 2015, Debra Britton (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,816.04 in alleged actual losses suffered as a result of a home improvement contract with Richard Stearns, trading as Honest Exteriors (Respondent).

I held a hearing on January 31, 2017 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant participated without representation. John Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent did not appear

for the hearing. After waiting fifteen minutes for the Respondent or someone to represent him, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1. The Claimant's overview of the case.
- Clmt. Ex. 2. The Claimant's calculation of her loss.
- Clmt. Ex. 3. Inspection Disapproval, June 18, 2013.
- Clmt. Ex. 4. Inspection Approved, August 7, 2015.
- Clmt. Ex. 5. Copies of three checks written to the Respondent, April 3 through May 28, 2013; copy of a check written to Ashford Kirby, September 7, 2013; Amazon.com order, June 20, 2013; invoices from The Roof Center, June 18 and July 31, 2015; and invoices from The Home Depot, August 1, 2015.
- Clmt. Ex. 6. Two contracts between the Claimant and the Respondent, April 3 and April 19, 2013.
- Clmt. Ex. 7. Emails between the Claimant and Tammy Sanders, July 28, 2015; product brochure for Fiberon Pro-Tect Decking.
- Clmt. Ex. 8. The Claimant's notes of a telephone conversation with TW Perry, July 30, 2015.
- Clmt. Ex. 9. Proposal from Calco Fence & Deck (Calco), August 14, 2015.

Clmt. Ex. 10. Nine photographs of the Claimant's deck.

Clmt. Ex. 11. Emails between the Claimant and the Respondent, June 27 through September 16, 2013.

I admitted the following exhibits into evidence on behalf of the Fund:

Fund Ex. 1. Notice of Hearing, October 13, 2016.

Fund Ex. 2. Notice of Hearing and other documents sent by certified mail to the Respondent by OAH, returned "Unclaimed" on November 10, 2016.

Fund Ex. 3. Affidavit of Teresa Rigby-Menendez, January 25, 2017.

Fund Ex. 4. The Respondent's driving record from the Maryland Motor Vehicle Administration (MVA), January 25, 2017.

Fund Ex. 5. Hearing Order, August 2, 2016.

Fund Ex. 6. The Respondent's licensing history with the MHIC, January 10, 2017.

Fund Ex. 7. Home Improvement Claim Form, November 17, 2015.

Fund Ex. 8. Letter from the MHIC to the Claimant, August 2, 2016.

Testimony

The Claimant testified in support of her claim. The Fund presented no testimony.

PROPOSED 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 01-103677.

2. On April 3, 2013, the Claimant and the Respondent entered into a contract to have the Respondent build an eight-foot by thirteen-foot deck on the rear of the Claimant's residence.

The contract did not include starting and completion dates for the work.

3. The contract price was \$9,250.00.

4. On April 19, 2013, the Claimant and the Respondent amended the contract to specify that, among other things, the deck would be constructed with Fiberon Pro-Tect Decking, which carries a twenty-year fade and stain resistance warranty.
5. The amendment of the contract did not change the contract price.
6. By June 2013, the Respondent appeared to have finished the deck as called for in the contract.
7. The Claimant paid the Respondent \$9,250.00 under the contract.
8. On June 18, 2013, the deck failed Montgomery County inspection because the stair risers were too tall, carriage bolts were improperly used for post and beam construction, there was no electrical receptacle on the deck, there was no illumination on the stairs, and some information about the materials used for construction was missing.
9. The Respondent also did not install some post caps and rail skirts and left temporary wooden flooring inside the house where he had installed the sliding glass door to the deck.
10. The Claimant contacted the Respondent about the inspection failure and other incomplete work in June through September 2013. The Respondent would not personally come to look at the deck, but did engage someone to work with the Claimant to get some of the incomplete items fixed.
11. The Claimant paid Ashford Kirby \$475.00 on September 7, 2013 to install the required electrical outlet.
12. The Claimant paid \$119.80 to Amazon.com on June 20, 2013 for the required lights on the stairs. She installed them herself.
13. The Claimant paid \$43.74 to The Roof Center for post caps and rail skirts that the Respondent was obliged to provide under the contract.

14. The Claimant paid \$117.63 to The Home Depot for a drill and drill bit for her husband and brother-in-law to use for replacing the carriage bolts.

15. The Claimant paid \$24.87 to The Home Depot for replacement bolts and washers.

16. Neither the Respondent nor the person he engaged to work with the Claimant brought the stairs or the carriage bolts into compliance, nor did they replace the temporary wooden floor by the door.

17. The Claimant and her husband were able to do enough work on the deck themselves to get it through inspection on August 7, 2015.

18. By that time, however, mold and discoloration had proliferated on the flooring of the deck.

19. The Claimant contacted Fiberon, the manufacturer of the decking material, and learned that the Respondent had not installed Fiberon Pro-Tect Decking, but rather Fiberon Classic Decking, a cheaper product.

20. Fiberon Classic Decking is not coated like Fiberon Pro-Tect Decking and is susceptible to mold, mildew, and staining. The manufacturer recommends cleaning it at least every six months.

21. Fiberon Classic Decking does not carry any fade and stain resistance warranty.

22. The Claimant did not attempt to have the Respondent provide the Fiberon Pro-Tect Decking called for in the contract or seek recompense for the difference between that product and the inferior product that the Respondent installed.

23. The Claimant's attempts to clean the decking with products recommended by the manufacturer have been unsuccessful.

24. The Claimant has received a proposal from Calco to replace the Fiberon Classic Decking with Fiberon Pro-Tect Decking for \$3,995.00.

25. The Respondent's address of record with the MHIC is 22835 Avenmar Drive, Leonardtown, Maryland 20650.

26. The Respondent's address of record with the MVA is 22835 Avenmar Drive, Leonardtown, Maryland 20650.

27. The OAH sent notices of this hearing to the Respondent at 22835 Avenmar Drive, Leonardtown, Maryland 20650 by certified mail and by first-class mail on October 13, 2016. The notice sent by certified mail was returned unclaimed; the notice sent by first-class mail was not returned undelivered.

DISCUSSION

The Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article, entitled "Hearings," states, in pertinent part, as follows:

(a) Except as otherwise provided in § 10-226 of the State Government Article, before the Commission takes any final action under § 8-311 of this subtitle, or if requested under § 8-620(c) of this title, it shall give the person against whom the action is contemplated an opportunity for a hearing before the Commission or, as provided under § 8-313 of this subtitle, a hearing board.

(b) The Commission shall give notice and hold the hearing in accordance with Title 10, Subtitle 2 of the State Government Article.

....

(d) The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission.

....

(h) If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.

Md. Code Ann., Bus. Reg. § 8-312 (2015).

Although the above statute applies to disciplinary proceedings against licensees, the MHIC uses the same procedures for hearings involving claims against the Fund, such as this case. Md. Code Ann., Bus. Reg. § 8-407(a) (2015). These procedures ensure, as much as

possible, that a contractor against whom a claim is filed is made aware of the date, time, and place of the hearing.

The notices in this case went to the Respondent's address of record with the MHIC, which, according to the MVA's records, is also his residential address. The OAH sent notices to that address by certified mail and by first-class mail on October 13, 2016. The notice sent by certified mail was returned unclaimed, but the copy sent by first-class mail was not returned undelivered by the U.S. Postal Service. From all of this information, I concluded that the Respondent received actual notice of the hearing and chose not to attend. Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h) (2015).

The Merits of the Case

The Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015); *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). 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 (2015). 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 Claimant. Second, the Respondent performed unworkmanlike, inadequate, and incomplete home improvements.

The Respondent's failures in this case fall into three categories. First, he did not finish the deck as called for in the contract. When the Respondent declared the deck complete and left the job site, some post caps and rail skirts had not been installed, and there was still a temporary wooden floor where the sliding glass door had been installed. The Claimant asked the Respondent to complete these items, and he agreed to, but never did. The Claimant and her husband purchased and installed the caps and skirts themselves, and the temporary flooring remains in place as of today.

Second, the Respondent's work was incompetent, in that the deck was constructed in a way that did not pass county inspection. The Respondent improperly used carriage bolts for post and beam construction and did not install an electrical receptacle or stair lighting as called for in the county's building code. The Claimant and her husband bought and installed the lights and paid Ashford Kirby \$475.00 to put in the receptacle. They also bought the correct bolts, along with tools for installing them, and performed that work themselves.

When the Claimant brought the issues of the inspection failure and the incomplete work to the Respondent's attention in June 2013, the Respondent replied, "I will step in and get this taken care of." (Clmt. Ex. 11.) The Claimant testified that the Respondent hired a contract manager named Greg Pierce to correct some of the problems,¹ but the electrical, lighting, stairs, and temporary flooring were never fixed. The Claimant continued to try to convince the

¹ The Claimant testified that the county inspectors failed the deck because it was not "freestanding," as required by the current building code, rather than supported by attachments to the house, which is how it was built. Whatever measures the Respondent and Mr. Pierce took to achieve compliance with code are not part of the record, nor are they included in the Claimant's claim. The work on this issue appears to have been successful, since the deck ultimately passed inspection in August 2015.

Respondent to complete the work, sending emails until September 2013. By September 16, 2013, the Respondent was essentially refusing to return to the job site or do any more work, telling the Claimant in an email that day that she should contact the subcontractors who worked on the deck, because the Respondent was "way down in St. Mary's county and have a full plate of customers and many things to do." (Clmt. Ex. 11.) At that point, the Claimant gave up on her efforts to have the Respondent complete the work.

Third, and most importantly, the Respondent committed outright fraud against the Claimant by contracting to build the deck using Fiberon Pro-Tect Decking, and telling the Claimant that he had used that product, when, in fact, he had used Fiberon Classic Decking, a cheaper, uncoated product that carries no warranty for fade and stain resistance and, according to the manufacturer, should be cleaned at least twice a year to prevent mold, mildew, and staining (Clmt. Ex. 7). By 2015, the deck was discolored by mold and stains, which cannot now be cleaned.

The Claimant testified that, when she learned that the Respondent had not supplied the product called for in the contract, she did not try to have the Respondent correct the problem or reimburse her. Section 8-405(d) of the Business Regulation Article provides: "The Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (2015). The Claimant stated that she did not attempt to contact the Respondent about this issue because he had already abandoned the project and had indicated that he intended to do no more work on the deck. The Respondent, of course, knew in 2013 that he had used an inferior product, susceptible to stains and mold, rather than the decking called for in the contract. He never informed the Claimant of his subterfuge, nor did he make any good faith effort to replace the Fiberon Classic Decking. In these circumstances, I find the Claimant's decision not to attempt to obtain redress

from the Respondent entirely reasonable, as any such effort would have undoubtedly been fruitless.

Instead, the Claimant sought a proposal from Calco, which in 2015 agreed to replace the existing decking with Fiberon Pro-Tect Decking for \$3,995.00 (Clmt. Ex. 9). The Claimant has not acted upon Calco's proposal, but it is unlikely that the cost of replacement has decreased with the passage of time, so I consider the \$3,995.00 a fair estimate of the cost of replacing the decking.

Based upon all the foregoing, I find that the Claimant is eligible for compensation from the Fund. I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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 Claimant has calculated her actual loss resulting from the Respondent's failure to perform the contract as \$4,816.04, comprising the following:

\$3,995.00 to replace the decking;
475.00 for the electrical outlet;
119.80 for lights on the stairs;
83.74 for post caps and rail skirts;
24.87 for bolts and washers; and
+117.63 for a drill and drill bit; equals
\$4,816.04 total.

The claim does not include any amount for replacing the temporary flooring next to the sliding glass door because the Claimant does not have an estimate for having that work done.

Of the above items listed in the claim, I agree that the Claimant should be recompensed for all except the last. The drill and drill bit are in the nature of "durable goods" that the Claimant can use for purposes other than repairing the deck. Strictly speaking, they are not called for in the contract, though the Claimant may have needed to purchase them to do the work. Therefore, after subtracting the \$117.63 for the drill and bit, I conclude that the Claimant's actual loss is \$4,698.41.

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), (5) (2015). The Claimant paid \$9,250.00 to the Respondent, which is more than her actual loss of \$4,698.41, as computed above. Accordingly, the Claimant is entitled to reimbursement of \$4,698.41. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,698.41 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); 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 \$4,698.41, 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 ten percent (10%) as set by the Maryland Home Improvement Commission,² and

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

Signature on File

March 7, 2017
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/sm
#166932

² See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of April, 2017, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION