IN THE MATTER OF THE CLAIM	*	**NICOLAS ORECHWA,**
OF HAMILTON SHOOP,	*	**ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF MARION LEWIS,	*	**OAH No.: LABOR-HIC-02-20-03012**
T/A M S LEWIS JR.	*	**MHIC No.: 19 (90) 1527**

* * * * * * * * * * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On July 17, 2019, Hamilton Shoop (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $4,270.00 in actual losses allegedly suffered as a result of a home improvement contract with Marion Lewis, trading as M S Lewis Jr. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015)[1]. On or about January 13, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

Pursuant to my May 14, 2020 Prehearing Conference report and Scheduling Order, I held a hearing on June 10, 2020. Bus. Reg. § 8-407(e). I was located at the OAH. The following

[1] Unless otherwise noted, all references to the Business Regulations Article herein cite to the 2015 Replacement Volume of the Maryland Annotated Code.

individuals participated via Google Meet: Andrew Brouwer, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

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. 2019); Code of Maryland Regulations (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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

Neither the Claimant nor the Respondent offered exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, January 8, 2020;

Fund Ex. 2 - Prehearing Conference Report and Scheduling Order, May 14, 2020;

Fund Ex. 3 - OAH Hearing Notice, May 12, 2020;

Fund Ex. 4 - OAH Hearing Notice, February 25, 2020;

Fund Ex. 5 - Letter from the Fund to the Respondent, August 1, 2019, with the Claimant's claim enclosed;

Fund Ex. 6 - The Respondent's MHIC licensing history.

Testimony

The Claimant testified and presented the testimony of Bill Gmeinwieser.

The Respondent testified and did not call any witnesses.

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 01-105189.

2. The Claimant bought his current Howard County residence in 1992. The Claimant bought the residence new with its original roof (the 1992 roof). The 1992 roof had a lifespan of about twenty years and complied with 1992 Howard County code provisions.

3. In 2012, the Respondent's roof reached the end of its typical lifespan and required replacement with updates to comply with current Howard County code provisions. That year, the Claimant began losing shingles on the 1992 roof and in response, solicited contractors to provide repair estimates.

4. The Claimant received estimates from various contractors who proposed to replace the roof in its entirety. The Claimant met with Respondent and requested the roof be replaced. The Respondent did not believe the 1992 roof needed replacement and instead suggested replacing all the 1992 roof's shingles and some of its plywood. Based upon this conversation, the Claimant concluded the Respondent would competently and adequately repair the 1992 roof.

5. The Respondent's specialty is framing, not roof repair.

6. On or about September 3, 2012, the Claimant and Respondent entered into a contract whereby the Respondent agreed to complete the following:

- remove all shingles and inspect plywood for water damage;
- replace up to six feet of plywood if needed;
- replace felt paper;
- use three tab shingles with a twenty-five year warranty;

- replace five feet of soffit;
- replace two roof boots and remove all debris.

7. The Claimant paid the Respondent a total of $2,850.00 in three installments of $950.00 in cash.

8. The Respondent completed the repairs within two or three weeks of September 3, 2012.[2]

9. In the years after its completion, some plywood on the 2012 roof became buckled and wavy. The Respondent failed to properly vent the 2012 roof, failed to include upgrades which would place it in conformity with 2012 Howard County code regulations, and failed to appropriately nail shingles.

10. In May 2019, the Claimant's homeowners insurance carrier (Allstate) notified him of possible structural defects in the 2012 roof.

11. In or shortly after May 2019, the Claimant contacted the Respondent to discuss the 2012 roof's structural problems. The Respondent declined to repair the 2012 roof.

12. The Claimant contacted several contractors who suggested the entire 2012 roof be replaced.

13. The Claimant then contacted Bill Gmeinwieser (Gmeinwieser) who, for a lower price, offered to repair instead of replace the entire 2012 roof. Gmeinwieser charged $4,270.00 which the Claimant paid.

14. The Claimant and Gmeinwieser entered into a contract. Per that contract, Gmeinwieser agreed to perform the following repairs to the 2012 roof:

- remove and replace existing shingles;
- remove and replace "bubbled" plywood;

[2] For the sake of clarity, when referring to the roof after completion of the Respondent's repairs, I shall refer to it as the "2012 roof."

- remove existing caps on the roof;
- cut down both sides and install a new ridge vent;
- install three new pop in vents;
- install three gables and soffit;
- install new roof "lubers" and existing gutter on the side;
- paint facia;
- remove debris.

15. Gmeinwieser completed all repairs per the terms of the contract.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).[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); *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

[3] As noted above, "COMAR" refers to the Code of Maryland Regulations.

Statute of Limitations

The Claimant and Respondent entered into their contract and the Respondent completed his work in 2012. However, the Claimant did not learn of problems with the Respondent's workmanship until 2019. "A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." *Id.* § 8-405(g). The Claimant testified he cannot see his roof in detail from the ground unless at a distance away and does not go up on it out of a fear of heights. Thus, I found the Claimant's testimony credible that he did not learn of the defects in the 2012 roof until Allstate contacted him in 2019. Accordingly, I find his claim falls within the Statute of Limitations.

The Claimant's case

The Claimant experienced no problems with the 1992 roof until 2012 when he began having to replace shingles. Sick and tired of replacing the shingles himself, which he deemed a dangerous task, the Claimant opted to solicit estimates from contractors. Most contractors provided expensive estimates which entailed replacement of the entire roof. The Claimant contacted the Respondent and discussed his wish to have the 1992 roof replaced. However, the Respondent, who quoted a lower cost, suggested the 1992 roof be repaired and not replaced.

The Claimant hired the Respondent because he "seemed like he knew what he was doing" and "seemed reputable." The Claimant agreed to pay the Respondent $2,850.00 to make various repairs to the 1992 roof. The repairs included, but were not limited to, replacement of all of the shingles and some of the plywood. The repairs did not include upgrades to make the roof compliant with Howard County code.

In May 2019, Allstate, the Claimant's home insurance carrier, contacted him and told him the roof appeared bowed and wavy.[4] Terrified of losing his insurance coverage, the Claimant contacted the Respondent to discuss fixing the roof. The Respondent told the Claimant he "did not do that work anymore" and refused to fix the 2012 roof. Unable to afford an entire roof replacement, the Claimant hired Gmeinwieser who replaced the shingles, replaced bowed or warped plywood and properly vented the roof to comply with the current code.

The Respondent's case

The Respondent testified that although he is a framer as opposed to a roofer, he agreed to repair the 1992 roof.[5] The Claimant told the Respondent he needed a new roof. However, the Respondent did not agree and only suggested making the repairs set forth in the September 3, 2012 contract. The Respondent contended he made the repairs to fix a leak over a mechanical room in the Claimant's residence. The Respondent replaced three sheets of rotted plywood on the 1992 roof around the chimney as well as all the 1992 roof's shingles. He denied buckling plywood could cause any "waviness" in the shingles. Instead, he attributed that problem to improper placement of shingles on a section of the 1992 roof completed by his inexperienced son. The Respondent contended he fixed his son's mistake.

Although he replaced all the roof's shingles, he saw no reason to modify or improve the roof's venting. He only installed "what was there already" in terms of venting – although he was unaccustomed to working on a residence like the Claimant's. When the Claimant reached out to him in 2019 about repairing the roof, the Respondent declined because he was sixty-three years old and no longer interested in walking on roofs or roof work.

---

[4] The Claimant testified that Allstate informed him it conducted an "audit" whereby an agent viewed covered properties to assess their conditions.

[5] The Respondent testified he did roof work approximately twenty times over a period of twenty years.

Analysis

The Claimant presented a persuasive case in the form of Gmeinwieser's testimony.[6] Gmeinwieser inspected the 2012 roof himself and concluded the Respondent should have replaced the 1992 roof in its entirety. I found Gmeinwieser's testimony credible. He had over forty years of experience with roofing and demonstrated a mastery of Howard County roofing code provisions. He further demonstrated a mastery of various roofing techniques and knowledge of their evolution since 1992. Although not formally qualified as an expert, for these reasons, I found his opinions persuasive.

Gmeinwieser testified that although the plywood the Respondent replaced was not yet buckled, the Respondent's failure to address fundamental venting issues caused the remaining 1992 plywood to deteriorate further. Those issues included the need to install ice and weather shields, properly nail shingles and ventilate the roof per current Howard County code provisions. Despite these issues, the Respondent's performance was unworkmanlike in a more fundamental sense – he should have replaced the 1992 roof in its entirety. Gmeinwieser opined that the 1992 roof reached the end of its lifespan in 2012. In the preceding twenty years, Howard County modified its roofing code provisions to account for advances in roof ventilation design. The condition of the all the plywood on the 1992 roof as a result of the old ventilation system required replacement of the entire roof, not just spot replacement of the plywood with re-shingling.

I find the Respondent's performance unworkmanlike. Having considered the evidence, I agree with Gmeinwieser that the Respondent should have replaced the entire 1992 roof. Instead, the Respondent, by his own admission, did not recommend the 1992 roof be replaced – just repaired. The 1992 roof's age warranted replacement. Assuming the 1992 roof did not need to be

[6] Although the Claimant did not seek to qualify Gmeinwieser as an expert, Gmeinwieser provided opinions, based on his own expertise, as to whether the Respondent performed in a workmanlike manner. Neither the Claimant nor the Fund objected to Gmeinwieser's opinion testimony.

replaced, I would still find the Respondent's performance unworkmanlike. He ignored code upgrades and roof ventilation issues which experienced competent roofers would have addressed.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In closing, the Fund took the position that $2,850.00, the amount the Claimant paid the Respondent under the contract, is the maximum amount the Fund can award. I agree. In this case, the Respondent completed work under the contract and the Claimant paid him $2,850.00 in full. Even though the Claimant may not have contracted with the Respondent to replace the entire 1992 roof (as Gmeinwieser opined should have been done), the Respondent still performed the work in an unworkmanlike manner under the contract. He did not vent the roof properly. He did not bring it up to code. He failed to properly nail shingles on certain parts of the roof. Moreover, had the Respondent appropriately replaced the entire 1992 roof, the Claimant would not have had to retain and pay Gmeinwieser to repair the roof in 2019. The Claimant entered into a contract with Gmeinwieser to remedy the Respondent's unworkmanlike performance. Gmeinwieser completed work under the contract and the Claimant paid him $4,270.00. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> 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 paid the Respondent $2,850.00 for his work in 2012. The Claimant paid Gmeinwieser $4,270.00 to fix the 2012 roof. Therefore I find the Claimant suffered an actual loss of $4,270.00.[7] The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a) (emphasis added). In this case, the Claimant's actual loss is more than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled recover his actual loss of $2,850.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss $2,850.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $2,850.00 from the Fund. *Id.*

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $2,850.00; 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

[7] ($2,850.00 + $4,270.00) - $2,850.00 = $4,270.00.

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[8] and

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

July 14, 2020
Date Decision Issued

Nicolas Orechwa
Administrative Law Judge

NO/cmg
186360

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

PROPOSED ORDER

WHEREFORE, this 4th day of September, 2020, 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
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION