

IN THE MATTER OF THE CLAIM	* BEFORE SUSAN A. SINROD,
OF JOHN CONSOLI,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JAMES HUBBARD	*
MCINTOSH,	* OAH No.: LABOR-HIC-02-23-25576
T/A ECONOMY REMODELING, INC.,	* MHIC No.: 22 (75) 828
RESPONDENT	*

* * * * *

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 April 14, 2023, John Consoli (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$21,875.00 for actual losses allegedly suffered as a result of a home improvement contract with James McIntosh, t/a Economy Remodeling, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On September 28, 2023, the MHIC issued a Hearing

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Order on the Claim. On September 29, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 10, 2024, I held a hearing at the OAH in Salisbury, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Kris King, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent did not appear for the hearing.³

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On November 2, 2023, the OAH sent a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail to his address of record with the MHIC, which was both his business and home address. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Respondent's personal representative's address was the same as the Respondent's. Fund Ex. #3. The Notice stated that a hearing was scheduled for January 10, 2024, at 10:00 a.m., at the OAH in Salisbury, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service returned the Notice to the Respondent sent by certified mail, with the notation "Unclaimed, Unable to Forward." The United States Postal Service did not return the Notice sent to the Respondent by regular mail. The Respondent's personal representative did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that proper notice was sent to the Respondent's address of record, which was also the address of his personal representative, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

³ The Respondent passed away on May 16, 2020.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); 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

I admitted the following exhibits offered by the Claimant:

- Cl. Ex. #1- Memorandum from the Claimant to the MHIC, dated May 30, 2022; Complaint Form, dated November 17, 2021
- Cl. Ex. #2- Obituary of the Respondent, dated May 27, 2020
- Cl. Ex. #3- Estimate of Economy Restoration LLC,⁴ dated November 3, 2021; photographs of the Claimant's roof, dated November 3, 2021
- Cl. Ex. #4- Expert Affidavit of Thomas Justin Meyers, dated January 8, 2024; email from Economy Restoration, LLC to the Claimant, dated November 3, 2021
- Cl. Ex. #5- Licensing information of Economy Restoration, LLC, undated
- Cl. Ex. #6- Better Business Bureau information on Economy Restoration, LLC, printed January 9, 2024
- Cl. Ex. #7- Twelve photographs, taken January 19, 2022, April 7, 2023, and December 10, 2023
- Cl. Ex. #8- Contract between the Claimant and the Respondent, dated January 28, 2014; copies of checks from the Claimant to the Respondent
- Cl. Ex #9- Printout of Camelot II Shingles Do Not Mix instructions, dated March 15, 2016

⁴Although the company names are similar, Economy Restoration, LLC is not the same as the Respondent, which was Economy Remodeling, LLC.

Cl. Ex. #10- Invoice from Polyansky Builders, dated November 24, 2020

Cl. Ex. #11- Home Improvement Claim Form, undated; Home Improvement Claim Form, dated April 1, 2023

No one appeared to offer exhibits on behalf of the Respondent.

I admitted the following exhibits offered by the Fund:

Fund Ex. #1- Notice of Hearing, dated November 2, 2023; Hearing Order, dated September 28, 2023; certified mail envelope and green card, returned to sender; dated December 5, 2023

Fund Ex. #2- Respondent's licensing history, dated January 9, 2024

Fund Ex. #3- Estate Record, Register of Wills, Queen Anne's County, filed June 3, 2020

Fund Ex. #4- Home Improvement Claim Form, received April 14, 2023

Fund Ex. #5- Letter from the MHIC to the Respondent, dated April 24, 2023

Testimony

The Claimant testified and did not present other witnesses. No one testified on behalf of the Respondent. The Fund did not present any 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 01-46692.

2. On October 7, 2014, the Claimant and the Respondent entered into a contract, wherein the Respondent agreed to replace the Claimant's roof (Contract). The Contract called for the installation of GAF Camelot II shingles with a GAF Systems Plus fifty year warranty.

The color of the shingles was Weathered Wood.

3. The original agreed-upon Contract price was \$21,875.00.

4. On October 7, 2014, the Claimant paid the Respondent \$6,825.00. On November 25, 2014, the Claimant paid the Respondent \$4,000.00. On November 29, 2014, the Claimant paid the Respondent \$11,000.00 for a total of \$21,825.00.

5. The Respondent completed the work under the Contract in November 2014.

6. The Respondent passed away on May 16, 2020.

7. In October 2020, the Claimant discovered a leak in the ceiling on the top floor of his home. Subsequently, he discovered additional leaks in the first floor ceiling coming from the same area.

8. The leaks occurred in the area of the roof just behind the chimney, because the caulk failed, the Respondent did not install new flashing when he installed the new roof, a cricket, or water diverting saddle was needed to create a watertight barrier, and a valley needed to be replaced.

9. The problems with the Respondent's roof installation did not manifest until October 2020 when the leak became visible because water started coming into the house. The area of the roof that leaked was behind the chimney, which was not visible from the ground.

10. The leaks caused significant ceiling and wall damage on the first and second floors of the Claimant's house.

11. In 2015, GAF, the roofing manufacturer, discontinued the Camelot II Weathered Wood shingles and replaced it with a new premium color blend called Weathered Timber. GAF specifications instructed that new Camelot II Weathered Timber shingles must not be mixed with the old Camelot II Weathered Wood shingles. Therefore, the entire roof must be replaced.

12. On November 3, 2021, the Claimant received an estimate from Economy Restoration, LLC to replace the roof for \$42,817.85.

13. The Claimant paid Polyansky Builders \$187.50 to install a metal strip drip edge and caulk the area to prevent wind and rain from entering the home.

14. The Claimant repaired the interior of the home that was damaged due to the roof leak. However, it has since been damaged again because the roof is still leaking.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a) (Supp. 2023); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp.

2023). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

The Claimant did not discover the leak in the roof until October 2020. The area of the roof that failed was behind a chimney and could not be seen from the ground. In 2020, water leakage became visible on the second floor ceiling. Approximately six months later, he found a leak in the first floor ceiling, directly underneath the upstairs leak, and directly beneath the area behind the chimney where the roofing was not properly installed. The Claimant tried to reach the Respondent to fix the problem. However, the Respondent's wife contacted the Claimant and told him that the Respondent passed away.

The Claimant's photographs depicted significant water stains and ceiling damage. Cl. Ex. #7. The Economy Restoration, LLC estimate to replace the roof included the construction of a "water diverting saddle (cricket)" to attach to the chimney, and proper flashing to create a water tight barrier. Cl. Ex. #3. Justin Myers from Economy Restoration took photographs of the Claimant's roof, which depicted poor workmanship at the location where the water leakage occurred. The notation on the photographs indicated that the Respondent did not replace the flashing and included an arrow that pointed out the old flashing. Given the poor workmanship and the discontinuation of the shingle color, I am convinced from the evidence that the Claimant's roof needs to be replaced. The evidence is undisputed. I conclude that the Claimant has established his entitlement to compensation from the Fund.

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) (Supp. 2023); COMAR 09.08.03.03B(1).

The Claimant submitted his Claim to the MHIC three different times in three different amounts because he was unsure of the proper calculation. He presented two of those claim forms at the hearing, one in the amount of \$64,692.95 and one in the amount of \$21,875.00, which constituted the Contract price.⁵ The estimate from Economy Restoration was \$42,817.95 in November 2021; the Claimant did not have an updated estimate, but today it would likely be higher. Pursuant to COMAR 09.08.03.02C a claimant may only amend the claim amount if the claimant “did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed,” or if the claimant’s “proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.” It is clear that the Claimant previously attempted to file his Claim in the higher amount of \$64,692.95 but was directed not to do so by the MHIC, for reasons unknown. Cl. Ex. #11. He testified that the MHIC told him to change the claim amount and re-submit the Claim, which he did. I conclude that an amendment to the higher claim amount would not prejudice the Respondent, because the cost to replace the roof is much higher than the Contract price due to changing times and rising prices. Based on this record, I will allow the amendment.

MHIC’s regulations provide three formulas to measure a claimant’s actual loss, depending on the status of the contract work.

The Respondent performed the work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. 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

⁵The Claimant actually paid the Respondent \$21,825.00, which was \$50.00 less than the Contract amount.

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 \$21,825.00 to the Respondent and \$187.50 to Polyansky Builders for the metal strip drip edge and caulk, which was an attempt at a temporary fix. He will need to pay at least \$42,817.95 to replace the roof. Added together, the total amount paid and to be paid is \$64,830.45 ($\$21,825.00 + \$187.50 + \$42,817.95 = \$64,830.45$). After subtracting the Contract price of \$21,875.00, the Claimant's actual loss is \$42,955.45.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁶ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$42,855.95 exceeds \$21,825.00, the amount that the Claimant paid the Respondent. Therefore, the Claimant's recovery is limited to \$21,825.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$42,855.95 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$21,825.00 from the Fund.

⁶ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$21,825.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁷ and

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

April 3, 2024
Date Decision Issued

Susan Sinrod
Susan A. Sinrod
Administrative Law Judge

SAS/ckc
#211029

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 11th day of June, 2024, 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***