

<p>IN THE MATTER OF THE CLAIM</p> <p>OF SUSAN CIAVERELLI,</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 TIMOTHY</p> <p>HOWELL,</p> <p>T/A B & H CHIMNEYS,</p> <p>RESPONDENT</p>	<p>* BEFORE WILLIS GUNTHER BAKER,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-11388</p> <p>* MHIC No.: 23 (75) 203</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 7, 2022, Susan Ciaverelli (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$4,700.00 for actual losses allegedly suffered as a result of a home improvement contract with Timothy Howell, trading as B & H Chimneys (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015 & Supp. 2022).² On April 10, 2023, the MHIC issued a Hearing Order on

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 Replacement Volume of the Maryland Annotated Code.

the Claim. On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On June 8, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Katherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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); 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

I admitted the following exhibits offered by the Claimant unless otherwise specified:

- Clmt. Ex. 1 - The Respondent's Chimney Inspection Report and Recommendations and the Contract, February 21, 2020
- Clmt. Ex. 2 - The Respondent's Chimney Repair Report, April 13, 2020
- Clmt. Ex. 3 - The Respondent's Chimney Estimate for Repairs, November 17, 2021
- Clmt. Ex. 4 - Stinebaugh Masonry, LLC (Stinebaugh) Estimate for Chimney Repair, February 22, 2022
- Clmt. Ex. 5 - Emails between the Claimant and Stinebaugh February 22, 2022 to July 18, 2022 and Stinebaugh photos of the Claimant's chimney, July 2022
- Clmt. Ex. 6 - Photos of Claimant's chimney after Stinebaugh completed work, July 2022
- Clmt. Ex. 7 - Photos of water damage in attic and bedroom area, undated

Clmt. Ex. 8 - Not admitted

Clmt. Ex. 9 - Stinebaugh Invoice, July 18, 2022 (did not include additional caulking)

Clmt. Ex. 10 - Stinebaugh Contract, June 27, 2022

Clmt. Ex. 11 - Copies of checks to Stinebaugh, June 28, 2022 and July 23, 2022

Clmt. Ex. 12 - Claimant's Payments to the Respondent, February 21, 2020 and April 28, 2020

Clmt. Ex. 13 - Emails between the Claimant and the Respondent, July 25 and 27, 2022

Clmt. Ex. 14 - Claimant's Complaint to the MHIC, August 19, 2022.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - MHIC Notice to the Respondent of the Claim, January 5, 2023

Fund Ex. 2 - Fund Claim Form, November 7, 2022

Fund Ex. 3 - MHIC Hearing Order, April 10, 2023

Fund Ex. 4 - Notice of Hearing, May 5, 2023

Fund Ex. 5 - Respondent's Licensing Information, printed June 6, 2023

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

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 01-144973.

2. On February 21, 2020, the Claimant and the Respondent entered into a contract to remove the chimney cap and tear down the top three courses of brick; add three terra cotta flu

liners; rebuild the top three courses of the chimney reusing as many bricks as possible to current dimensions; grind out and repoint the next five course from the top, the fourth through eighth courses of brick; lay a cement crown; reinstall the cap; install a stainless-steel furnace liner with vent pipes; and seal the entire exterior chimney with water repellant. (Contract).

3. The original agreed-upon Contract price was \$5,038.00.
4. The Contract specifically excluded warranties.
5. On February 21, 2020, the Claimant paid the Respondent a deposit of \$1,679.00 and on April 28, 2020, the Claimant paid the Respondent the balance of \$3,359.00 for completion.
6. The Respondent recommended a chimney inspection in one year, but the Claimant did not have the Respondent inspect the chimney in April of 2021.
7. On a date unclear in the record, but sometime around the spring of 2021, after the Respondent worked on the Claimant's chimney, the Claimant discovered water infiltration in her attic that appeared to be coming from the chimney that caused damage in the attic and a spare bedroom.
8. The Claimant contacted the Respondent around November 2021. On November 17, 2021, the Respondent inspected the chimney and gave the Claimant two estimates for additional work. The first estimate was to grind out and repoint mortar joints near the flashing, repair a hole in the twelfth course of brick and reapply water repellant to the chimney at a cost of \$565.00. The second estimate involved erecting scaffolding to grind out and repoint mortar in courses nine through twenty and reapply water repellant to the chimney at a cost of \$2,765.00. The Claimant declined both options.
9. On February 22, 2022, Stinebaugh provided the Claimant with an estimate for the chimney to repoint the twenty courses of brick above the roofline, add a new concrete crown

with overhang, and spot point the holes throughout the chimney for a cost of \$4,700.00. The work was scheduled for summer 2022. The Claimant accepted the estimate.

10. Stinebaugh completed the work in July 2022. Eric Stinebaugh took several photographs of the chimney before starting the work and noted grind marks not filled with cement and holes in head joints toward the base of the chimney near the flashing.

11. There are no statutory impediments to the Claimant's recovery from the Fund.

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; 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. 2022); *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 not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. 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. 2022). 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. 2022). 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. 2022). 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. 2022).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2022). The Respondent was notified that the Claimant was experiencing a leak some time around November of 2021. Since the original contract work was completed in April of 2020 and the Claimant had not had the Respondent come out for an annual inspection, the Respondent provided the Claimant with two estimates to do further work, rather than consider this a warranty issue, as the Contract specifically excluded warranties. The Respondent did not offer to make repairs at no cost to the Claimant due to the passage of time and scope of the original work.

The Claimant originally contacted the Respondent in February 2020 to get an estimate to install a stainless-steel furnace liner for the chimney. While the Respondent was there, the Claimant requested that he do an overall inspection of the chimney and flashing. The agreed upon work was for the Respondent to install three terra cotta flu liners because the Claimant had a double chimney and the furnace, which necessitated the removal of three rows of brick to accommodate the flu liners. Rows one through three were rebuilt using as many of the old bricks as possible and rows four through eight were ground out and repointed. The Respondent also installed the stainless-steel furnace liner, the cement crown, replaced the original cap, and coated the chimney with Chimney Saver water repellent. The Respondent did not do any work below the eighth course of brick and testified that when he observed the flashing it looked fine.

The Claimant testified that she noticed some water damage in a spare bedroom below the attic in the spring of 2021 and that the water infiltration had started gradually in an unfinished part of the attic, so she was not sure when it actually began. She testified that the roof had been replaced ten years prior so she called the roofer to inspect, but he said the flashing was fine and he would need to tear off a part of the roof to further investigate, which she declined to do.

The Claimant did not contact the Respondent about the leak until around November 2021. She testified that Eric Stinebaugh told her that the photographs he provided were the "smoking gun" that the Respondent had failed to fill grind marks with cement and that some head joints had holes that were not filled. All of these alleged defects were below the eighth course of brick. However, Mr. Stinebaugh did not provide an expert report or testify at the hearing. Further, Stinebaugh was hired to find and repair the leak, not to repair the scope of work carried out by the Respondent.

The Respondent testified that when he first inspected the Claimant's roof in February 2020, he did notice some cracked bricks and missing joints, so he recommended that he ground and repoint five courses of brick below the three courses he was rebuilding. He stated that he would only provide an estimate for work that he believed needed to be done. He testified that he recommended an annual inspection so that things could be addressed before they became a problem, but the Claimant did not ask him to come back until November 2021, a year and a half after he did the work. He felt that due to the passage of time and the age of the chimney, it was not his responsibility. The Respondent did provide a new estimate for additional work and much of what he suggested was done by Stinebaugh.

The Fund indicated that the Respondent was a licensed contractor at the time of the Contract and there were no statutory barriers to the Claimant's recovery. However, the Fund pointed out that the Claim had to be legally sufficient and that the evidence was unclear as to

whether the Respondent failed to repair something he should have known about, or whether the issues with the leak arose later. It also argued that the contract with Stinebaugh exceeded the scope of the original Contract in some ways and because Stinebaugh did not break out his costs, it was unknown what amount could be considered a repair versus a new item.

Two years passed between the Respondent's initial inspection of the chimney and the Stinebaugh inspection. Many things can happen in two years, particularly when things are exposed to the elements. There was no evidence presented that the work completed by the Respondent was unworkmanlike, inadequate, or incomplete. There was an assumption by the Claimant that because there was a leak from the chimney into her attic, the Respondent was responsible because he worked on it last. However, there was no evidence that the work that was done caused the leak. The Claimant argued that the Respondent should have seen the missing joints and mortar and had he repaired them, she would not have had the leak. This is completely speculative. There is no way to know if those things observed by Mr. Stinebaugh in February 2022 existed in February 2020. There is also no way to know if any of the work done by the Respondent impacted the leak in any way. Furthermore, the Respondent was initially contacted regarding installing a furnace liner, not to repair a leaking chimney. The chimney repairs were incidental to the flu and furnace liner work. On the other hand, Stinebaugh was hired specifically to repair the leak.

While Steinbaugh replaced some of the work done by the Respondent, it appears it was necessary only because the entire exterior chimney was being replaced. There was no evidence that what the Respondent did was done improperly or not to industry standards. There was no evidence that the cement crown installed by the Respondent was improper, even though Stinebaugh replaced it and added an overhang.

The Respondent testified credibly that he has worked with historical restorations, and he knew that the work needed to look like what was originally there. He testified that he built up the crown to the flu liner with a rubberized coat to keep it watertight and did not know why Stinebaugh could not have reused it. The Respondent did everything that the Contract required. The Contract called for work down the first eight courses of brick from the top. Stinebaugh removed and replaced twenty courses of brick down to the roofline to address the leak in the chimney and replaced the concrete crown for no explicable reason. It was a different scope of work to address a different problem. There is no support that the leak problem was directly or indirectly caused by the Respondent's work or that he knew or should have known the chimney was leaking at the time he inspected it or that it would leak shortly thereafter. In short, there was no evidence presented that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss of \$4,700.00 as a result of the Respondent's acts or omissions and may not recover from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022)

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's Claim; and

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

August 30, 2023
Date Order Mailed

WGB/ckc
#207055

Willis Gunther Baker

Willis Gunther Baker
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 25th day of October, 2023, 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**