

IN THE MATTER OF THE CLAIM OF	* BEFORE DANIEL ANDREWS,
LASHAWN L. DAVENPORT	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-09-01794
OMISSIONS OF ROBERT E. LEE T/A	* MHIC NO.: 07 (75) 965
RAZORBACK BUILDERS and BRIGHTER	*
SOLUTIONS	*

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On February 5, 2007, Lashawn L. Davenport (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC or the Commission) Guaranty Fund (Fund) for the actual loss he allegedly suffered as a result of the acts and omissions of Robert E. Lee t/a Razorback Builders and Brighter Solutions (Respondent). On December 10, 2008, the Commission issued a Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) for a hearing on the claim filed by the Claimant.

On June 29, 2009, I conducted a hearing at the Largo Government Center, 9201 Basil Court, Room 102, Largo, Maryland 20774, pursuant to the Maryland Annotated Code. Business

Regulation Article,<sup>1</sup> § 8-407(a) (incorporating the hearing provisions of Business Regulation § 8-312). Eric London, Assistant Attorney General, appeared on behalf of the Fund. The Claimant represented himself. The Respondent failed to appear for the hearing.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01 and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

### **ISSUES**

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions and, if so, what amount is the Claimant entitled to recover from the Fund?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant submitted the following documents, which I admitted into evidence:

- CL Ex. #1: Contract between the Claimant and Respondent, May 3, 2006
- CL Ex. #2: Claimant's checks paid to the Respondent, including check number 1585 in the amount of \$1,953.00 issued May 3, 2006<sup>2</sup> and check number 1593 in the amount of \$2000.00
- CL Ex. #3: P & H Home Improvement proposal to remove and replace sliding glass door in the amount of \$1,400.00, dated April 15, 2007 with notation of being paid on April 21, 2007
- CL Ex. #4: Lowe's Home Centers, Inc. receipt for purchase of six foot sliding door in the amount of \$459.00, dated April 23, 2007
- CL Ex. #5A: Photograph of wooden steps for decking depicting gaps
- CL Ex. #5B: Photograph with a view under the deck depicting the manner in which the deck is supported

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<sup>1</sup> Throughout this Recommended Decision, any citation to the Maryland Annotated Code, Business Regulation Article shall be as "Business Regulation" and refer to the 2004 Replacement Volume and the 2009 Supplement to the Maryland Annotated Code, as appropriate.

<sup>2</sup> This check is dated May 3, 2005 but the testimony and other circumstances reflect that the proper date of issuance is May 3, 2006.

- CL Ex. #5C: Photograph of deck railing depicting gaps and warping
- CL Ex. #5D: Photograph of deck railing depicting warping and buckling
- CL Ex. #5E: Photograph of overlapping railing and flush railing
- CL Ex. #5F: Photograph depicting non-uniform spacing between deck rails
- CL Ex. #5G: Photograph of spacing and bent deck rail and photograph of over hanging deck support joist
- CL Ex. #5H: Photograph of spacing between decking boards on steps
- CL Ex. #5I: Photograph with under deck view depicting exposed nails and bolts and support joists
- CL Ex. #5J: Photograph of new slider door installed by P & H Home Improvements, Inc.
- CL Ex. #6: Claimant's letter to Respondent, October 27, 2006
- CL Ex. #7: P & H Home Improvement proposal to brace existing deck, check footings, piers, anchors, all joists and reinstall if needed, repair deck rails and boards, repair steps in the amount of \$4,000.00

The Fund submitted the following documents, which I admitted into evidence as:

- Fund Ex. #1: Notice of Hearing for June 29, 2009, mailed to the Respondent at 12319 Rambling Lane, Bowie, Maryland 20715 on March 10, 2009
- Fund Ex. #2: Affidavit of Tom Marr
- Fund Ex. #3: Licensing History for Respondent, June 9, 2009
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- Fund Ex. #8: Gold Tree estimate in the amount of \$3,200.00, February 2, 2007

### Testimony

The Claimant testified on his own behalf and presented the testimony of Robert L. Davenport. The Fund did not present any witnesses.

### FINDINGS OF FACT

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

1. On May 3, 2006, the Respondent was a licensed home improvement contractor under MHIC license number 01-22952 and 05-29797.
2. On April 18, 2000, the Respondent notified the MHIC that his address of record is 12319 Rambling Lane, Bowie, Maryland 20715. On June 29, 2009, the date of the hearing in this matter, the Rambling Lane address remains the Respondent's address of record.
3. As of June 9, 2009, the Maryland Motor Vehicle Administration (MVA) records reflect that the Respondent's driving privilege status is valid and his address of record is 12319 Rambling Lane, Bowie, Maryland 20715.
4. On May 3, 2006, the Claimant entered into a home improvement contract with the Respondent requiring the Respondent to build a raised pressure-treated wooden deck ten feet by twelve feet in size. Under the contract, the Respondent would attach the new deck to the Claimant's residence, build a stairway for the deck, and install a new eight foot wide doorway to create access to the deck from the dining room. In order to install the doorway, the dining room window was required to be removed and a new door frame constructed, which would accommodate the new door.
5. The total contract price was \$5,860.00.
6. On May 3, 2006, as an initial down payment on the total contract price, the Claimant paid the Respondent \$1,953.00.

7. After some initial delays in starting the construction of the Claimant's deck, on June 26, 2006, the Respondent began work under the contract by digging several footings for the deck.

8. On June 26, 2006, the Claimant made a second payment to the Respondent in the amount of \$2,000.00.

9. On June 30, 2006, the Respondent began to build the raised deck and stairway, completing this phase of the construction on or about July 1, 2006.

10. Since July 1, 2006, the Respondent has not returned to complete the contract, including the installation of the dining room access door.

11. From July 1, 2006 through October 27, 2006, the Claimant made several requests of the Respondent to confirm and document that the dining room/deck door had been ordered.

12. On July 28, 2006, during the process of getting the door ordered and installed, the Claimant amended the contract, altering the requirement of an eight foot-wide-door to a six-foot-wide door.

13. The Respondent made several oral representations that the door had been ordered and that he would expedite the installation of the door. However, the Respondent never ordered the door and never returned to the Claimant's home to finish the contract.

14. On April 15, 2007, the Claimant contracted with P&H Home Improvement (P&H), a licensed home improvement contractor, to remove a dining room window and replace it with a six foot wide sliding glass door (creating the access from the dining room onto the deck). The contract price was \$2,800.00. On this date, the Claimant paid P&H \$1,400.00.

15. On or about April 21, 2007, P&H completed the work and the Claimant paid P&H the balance of \$1,400.00.

16. The door installation contract did not include the price of purchasing the door. On April 23, 2007, the Claimant separately purchased the door at a cost of \$459.90.

17. After the Respondent completed construction of the deck and stairway, the Claimant experienced and observed several workmanship issues involving the deck and stairway construction. The Claimant noticed that the deck and stairway were not properly braced or supported, because the deck and stairway wobbled or swayed when walking on them. The Claimant observed that many decking boards were installed loosely and with uneven spacing between boards. The Claimant observed that decking rails were installed with uneven cuts or with warped pieces of wood. Additionally, the Claimant found that decking joists were installed in a manner causing the corners to protrude out from under the deck in a dangerous manner. Finally, the Claimant also found several portions of the deck were installed without recessing bolts, caused the bolts to project outward in a dangerous manner.

18. On November 3, 2007, the Claimant entered into a second contract with P&H to repair the Respondent's work. This second contract required P&H to properly brace the deck and stairway by installing braces on deck posts, repair or brace any anchors, joists or hangars, and reinstall, if required. P&H was to repair all loose deck boards and rails and replace any improperly installed deck boards or rails. Finally, P&H was to stain the deck in order to make the repair work look uniform with the existing deck material. The contract price was \$4,000.00.

19. P&H made the repairs required under the contract and the Claimant paid P&H \$4,000.00; however, the Claimant performed the stain work himself at a cost of \$242.00.<sup>3</sup>

20. The Claimant's actual loss for the Respondent's failure to complete the original home improvement contract is determined by adding together the actual amount paid to the Respondent (\$3,953.00), the amount paid to P&H to complete the original contract (\$2,800.00), and the amount the Claimant paid for the sliding door (\$459.90) for a subtotal of \$7,212.90.

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<sup>3</sup> During the hearing the Claimant agreed with the Fund that the labor cost in staining the deck themselves equaled \$12.00 per hour and that it took sixteen hours to complete. Further the cost of the stain was agreed to be \$50.00. Based upon these agreed terms, the total cost staining the deck was \$242.00.

From the subtotal of \$7,212.00, the original contract price (\$5,860.00) must be subtracted for an actual loss for an incomplete contract of \$1,352.90.

21. The Claimant's actual loss for the Respondent's unworkmanlike performance in constructing the deck and stairway is equal to the amount paid by the Claimant to P&H to repair the deck and stairway, or \$4,000.00.

22. The Claimant's total actual loss for the Respondent's incomplete and unworkmanlike home improvement performance is determined by adding together \$1,352.90 and \$4,000.00 and then subtracting out the cost to stain the deck (\$242.00) for a total actual loss of \$5,110.90.

### **DISCUSSION**

#### **The Respondent's Failure to Appear**

A preliminary issue is whether the Respondent was provided due notice of the hearing. Business Regulation § 8-312(a) provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. On or about March 10, 2009, the OAH scheduled a hearing in this matter to be held on June 29, 2009; however, the Respondent failed to appear for the hearing. Under Business Regulation § 8-312(h) "[i]f, after due notice, the person against whom the action is contemplated does not appear ... the Commission may hear and determine the matter."

For hearings involving claims against the Fund, the OAH, as a matter of regular practice, sends notices of hearings to the parties by regular first class mail and certified mail return-receipt requested. On March 10, 2009, the OAH sent to the Respondent a Notice of Hearing, consistent with the OAH mailing practice, to the Respondent's address of record with the MHIC, which was 12319 Rambling Lane, Bowie, Maryland 20715. The notice of hearing sent by regular mail was not returned to the OAH. The notice of hearing sent to the Respondent by certified mail

return-receipt requested was returned to the OAH as unclaimed. In *Landover Associates Limited Partnership v. Fabricated Steel Products, Inc.* 35 Md. App. 673, 681 (1977) (internal citations omitted), the Maryland Court of Special Appeals stated:

For at least a century past, Maryland has recognized a 'legal presumption' from proof of proper mailing that the communication was received. This presumption is based upon a further presumption that in delivering the mail the postal authorities do what the law requires of them.

On June 9, 2009, Tom Marr, an investigator for the MHIC, performed a computer check of the Maryland MVA records and determined that on this date the Respondent possessed a valid driver's license and had a address on record of 12319 Rambling Lane, Bowie, Maryland 20715. Since April 18, 2000, the Respondent was a licensed contractor with the MHIC, using an address of 12319 Rambling Lane, Bowie, Maryland 20715. However, on November 3, 2006, the Respondent's MHIC license expired.

In this case, the OAH mailed to the Respondent two separate notices of the hearing. The notice mailed by certified mail return-receipt-requested was returned to the OAH as unclaimed. However, the notice mailed by regular first class mail was not returned to the OAH. As noted in *Landover Associates Limited Partnership*, there is a presumption that this communication was received if properly mailed. I am satisfied that the notice of hearing was properly mailed because the notice mailed first-class regular mail was sent to the Respondent's last known address of record with the MHIC, which was the same as the Respondent's current address of record with the MVA. Therefore, I am satisfied that the Respondent was provided due notice of the scheduled hearing. Further, because I find that the Respondent had due notice of the hearing, I am also satisfied that it was proper to conduct the hearing in the Respondent's absence.

#### Applicable Law

Maryland law provides that an owner may recover compensation from the Fund, "for an actual loss that results from an act or omission by a licensed contractor." Business Regulation §



8-405. Actual loss is defined as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Business Regulation § 8-401. The Claimant bears the burden of proof, which is by a preponderance of the evidence, that he is entitled to reimbursement from the Fund because of an actual loss suffered as a result of unworkmanlike, inadequate or incomplete home improvement by a licensed contractor. Business Regulation § 8-407(c)(1), COMAR 09.08.03.03A(3), and COMAR 09.01.02.16C.

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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.

### Analysis

On May 3, 2006, the Claimant entered into a contract with the Respondent to build a raised pressure-treated wooden deck ten feet by twelve feet in size. The contract required the Respondent to attach the new deck to the Claimant's residence, build a stairway for the deck, and install a new eight foot wide doorway to create access to the deck from the dining room. In order to install the doorway, the dining room window was required to be removed and a new door frame constructed, which would accommodate the new door. The total contract price was \$5,860.00. At the time, the Respondent was a licensed with the MHIC under contractor's license number 01-22952 and 05-29797.

On May 3, 2006, the Claimant paid the Respondent an initial down payment of \$1,953.00. On June 26, 2006, the Respondent began to build the deck by digging several footings for the deck. On this date, the Claimant made a second payment to the Respondent in the amount of \$2,000.00. Then, on June 30, 2006, the Respondent began to construct the deck and attached stairway and completed the construction on July 1, 2006. Thereafter, the Respondent never returned to the Claimant's home to install the access doorway from the dining room area onto the deck.

From July 1, 2006 through October 27, 2006, the Claimant made several requests of the Respondent to confirm that the door was ordered and that work to install the door would begin. During this process, on July 28, 2006, the Claimant altered the contract requirement of an eight-foot-wide door to a six-foot-wide door. However, despite the Respondent's assurances that a door was ordered and that he would expedite the installation, the Respondent never returned to the construction project.

Based upon this evidence, the Claimant contends that he suffered an actual loss by the Respondent's failure to complete the home improvement contract. The Fund agreed with the Claimant's position and so do I. The evidence, as discussed above, establishes by a preponderance of the evidence that the Claimant sustained an actual loss because the Respondent failed to complete the home improvement contract by not purchasing or installing the six foot wide doorway. Business Regulation §§ 8-401 and 8-405.

On April 15, 2007, the Claimant's entered into a contract with P&H Home Improvement to remove the Claimant's dining room window and build a doorway onto the deck, which would accommodate a new door. The contract price was \$2,800.00. On April 15, 2007, the Claimant paid P&H \$1,400.00. The P&H contract did not include the price of a new door, because the Claimant purchased a six-foot-wide sliding glass door separately for \$459.00. On or about April 21, 2007, P&H performed the work and the Claimant paid the balance of \$1,400.00.

After the Respondent completed construction of the deck and stairway, the Claimant experienced and observed several workmanship issues involving the deck and stairway construction. The Claimant noticed that the deck and stairway was not properly braced or supported, because the deck and stairway wobbled or swayed when walking on them. The Claimant observed that many decking boards were installed loosely and with an uneven spacing between boards. The Claimant observed that decking rails were installed with uneven cuts or with warped pieces of wood. Additionally, the Claimant found that decking joists were installed in manner causing the corners to protrude out from under the deck in a dangerous manner. Finally, the Claimant also found several portions of the deck which were installed without recessing several bolts, caused the bolts to project outward in a dangerous manner.

On November 3, 2007, the Claimant entered into a second contract with P&H to repair the work the Respondent performed in constructing the deck and stairway. This second contract

required P&H to properly brace the deck and stairway by installing braces on deck posts, repair or brace any anchors, joists or hangars, and reinstall, if required. P&H was to repair all loose deck boards and rails and replace any improperly installed deck boards or rails. Finally, P&H was to stain the deck in order to make the repair work look uniform with the existing deck material. The contract price was \$4,000.00, which the Claimant paid. However, the Claimant performed the stain work himself at a cost of \$242.00.

Based upon this evidence, the Claimant contends that he suffered an actual loss because the Respondent constructed the deck and stairway in an unworkmanlike manner. Again, the Fund agreed with the Claimant's position. Based upon my review of the evidence, I am satisfied by a preponderance of the evidence that the Claimant sustained an actual loss because the Respondent performed a home improvement in an unworkmanlike manner. Business Regulation §§ 8-401 and 8-405. I reach this conclusion because the photographic evidence clearly shows that the decking boards, deck rails, and stair rails were installed improperly. Further, the Claimant's testimony that the deck and stairs swayed when walking upon them as a result of improper braces or support is strong evidence of unworkmanlike construction.

Based upon my determination that the Claimant suffered an actual loss because the Respondent failed to complete the home improvement contract and also performed work in an unworkmanlike manner, I now address the amount of reimbursement for which the Claimant is entitled. In this case, I find it appropriate to use the actual loss calculation as provided in COMAR 09.08.03.03B(3)(c), which states:

(c) 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.

Accordingly, I have determined that the under the original contract, the Claimant paid the Respondent a total of \$3,953.00. The Claimant hired another contractor, P&H, to complete the original contract. In doing so the Claimant paid P&H \$2,800.00. Further, under the contract with the Respondent, the cost of purchasing the door was included, however the Claimant had to expend another \$459.90 to purchase the door installed by P&H. Consequently, this amount is calculated into the award. Adding these figures together, the Claimant paid \$7,212.90 to have the original contract completed. By subtracting from \$7,212.90 the original contract price between the Claimant and Respondent, which was \$5,860.00, the amount of actual loss sustained by the Claimant as a result of an incomplete home improvement is \$1,352.90.

In this case, the Respondent also performed work in an unworkmanlike manner which the Claimant paid \$4,000.00 to have repaired. The Fund contends this amount should be added to the \$1,352.90 award for an incomplete contract to determine the total actual loss sustained by the Claimant for an incomplete and unworkmanlike home improvement. I agree with this position. Therefore, the total actual loss sustained by the Claimant is \$5,352.90. However, the Fund also contends, and the Claimant agreed, that the cost of staining the deck, which is \$242.00, should be deducted out of the final award amount. In doing so, the final total amount of actual loss sustained by the Claimant and which the Claimant is entitled to receive from the Fund is \$5,110.90.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Claimant has an actual loss as a result of the Respondent's incomplete and unworkmanlike home improvement. Business Regulation §§ 8-405(a) and 8-407(e)(1).

Additionally, I conclude as a matter of law that the Claimant has established an actual loss in the amount of \$5,110.90. Business Regulation § 8-405(e)(1).

**RECOMMENDED ORDER**

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

**ORDER** that the Claimant be awarded \$5,110.90 from the Maryland Home Improvement Commission Guaranty Fund; and

**ORDER** that the Respondent be 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 Commission, Business Regulation § 8-411; and

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

September 28, 2009  
Date Decision Mailed

DA/ch  
# 108161

A large black rectangular redaction covers the signature of Daniel Andrews.

Daniel Andrews  
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF  
LASHAWN L. DAVENPORT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
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\* BEFORE DANIEL ANDREWS,  
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\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-HIC-02-09-01794  
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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 29th day of October 2009, 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.*

*J. Jean White*

*I. Jean White  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION