

CLAIM OF LOIS DICARLO AGAINST
THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND,
REGARDING THE ALLEGED ACTS
AND OMISSIONS OF TIMOTHY E.
DAUSES, T/A FENCE DECK TECH,
THE RESPONDENT

* BEFORE MARLEEN B. MILLER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH NO.: DLR-HIC-02-12-22264
*
* MHIC NO.: 10 (90) 1021
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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 June 7, 2010, Lois Dicarlo (the Claimant) filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC or the Commission) Guaranty Fund (the Fund), for reimbursement of the actual losses she allegedly suffered as a result of the acts and omissions of Timothy Dauses t/a Fence Deck Tech (the Respondent). After investigation, the Commission issued a May 17, 2012 Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) on May 12, 2012.

On November 13, 2012, I conducted a hearing on the Claim at OAH's Administrative Law Building in Hunt Valley, Maryland pursuant to section 8-407(a) of the Maryland Annotated

Code's Business Regulation Article¹ and Code of Maryland Regulations (COMAR) 09.08.02.01B (incorporating the hearing provisions of Business Regulation Article § 8-312 and COMAR 09.01.03). The Claimant and the Respondent represented themselves, and Assistant Attorney General Eric B. London appeared on the Fund's behalf.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); 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 as the exhibits numbered below:

1. The Respondent's Proposal, accepted by the Claimant on June 13, 2009
2. Two photographs of the Claimant's home
3. The Claimant's checks payable to the Respondent
4. November 9, 2009 receipts from Glyndon Gardens
5. November 13, 2009 invoice from Charles Luck Stone Center
6. November 13, 2009 invoice from Mohawk Tile and Marble
7. November 16, 2009 invoice from Potomac Valley Brick and Supply Company

¹ Throughout this Recommended Decision, the 2010 Replacement Volume and 2012 Supplement to the Maryland Annotated Code's Business Regulation Article will be collectively referred to as the Business Regulation Article.

8. November 7, 8, 9, 10, 14, 15, 18 and 20, 2009 receipts from The Home Depot
9. QEP Master Cut 3/5 HP Wet Tile Saw Product Description
10. December 2, 2009 invoice from R & R Contracting
11. Not admitted
12. Estimate from David Weber, Inc., undated
13. December 14, 2009 estimate from Brothers Services Company
14. Estimate from Tagg Masonry, undated
15. August 22, 2011 Completion Certificate from Advantage Gutter Systems
16. November 9, 2010 check from the Claimant payable to Domenic Petrucci Construction
17. Photograph of December 17 Caller ID display (no year provided)
18. Not admitted
19. Not admitted
20. March 7, 2011 letter from the Claimant's neighbor, Josue F. Fernandez
21. March 7, 2011 letter from the Claimant's neighbor, Diane L. Vigliato
22. CD of 114 photographs

The Respondent submitted no documents for admission into evidence.

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

1. August 14, 2012 Notice of Hearing
2. September 18, 2012 certification from the Commission's Executive Director regarding the Respondent's licensing history
3. The Commission's May 17, 2012 Hearing Order
4. The Claimant's June 7, 2010 Claim

5. June 10, 2010 letter from the Commission to the Respondent
6. Amended Claim Amount, dated September 13, 2010
7. February 8, 2011 letter from the Commission to the Respondent

Testimony

The Claimant and the Respondent testified on their own behalves. The Fund presented no witnesses.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor, MHIC License # 01-80377.
2. After successfully installing a fence around the Claimant's property, located at 6712 Old Harford Road in Baltimore, Maryland (the Property), in or around August 2008, the Respondent suggested that the Claimant employ him to install stonework to replace the concrete on her pavement, driveway, porches and steps.
3. The Claimant followed the Respondent to his home to see the quality of the stonework he had installed on his own property, and she liked what she saw.
4. In the Spring of 2009, the Respondent advised the Claimant that he would look into pricing the installation of stonework and the related work that the Claimant requested that he perform.
5. The Respondent next spoke to the Claimant in November 2009.
6. On November 13, 2009, the Claimant and the Respondent entered into a contract (the Contract), by which they agreed that the Claimant would pay \$5,000.00 to the Respondent for his labor in performing the following work (the Work):

- Phase One Securing of metal lathe to the foundation, with a scratch coat of mortar troweled over the lathe, and installation of glass block with mortar in seven foundation windows, with one covered with durarock.
Labor cost \$1,250.00
- Phase Two Attachment of stone with mortar to the entire foundation wall (approximately 300 square feet). Placement of accent stone around the windows. Pointing of all joints with colored mortar of the Claimant's choice. Labor cost \$1,250.00
- Phase Three Installation of stone over the front and back porch (approximately 120 feet), with steps (approximately 100 feet) also wrapped in stone. Pointing of all joints with colored mortar of the Claimant's choice. Securing and cleaning of gutters. Sanding and painting of metal door. Labor cost \$1,250.00.
- Phase Four Breaking up and tamping of concrete walkway in rear yard to provide a base for pouring of new concrete. Installation beyond the back porch of a six-foot patio area with two expansion joints filled with commercial caulk. Installation of a walkway going four feet beyond the gate on the side of the Claimant's home. Installation of stone over a concrete base for the patio and walkway (approximately 165 feet). Cutting of grooves in the driveway area in front of the Claimant's shed, so that a thin-set mortar could be poured into it. Sloping of the new concrete away from the home. Installation of a ramp in front of the shed with concrete and stone installed over it. Labor cost \$1,250.00.

- Relocation of leftover stone from driveway to the other side of the Claimant's home.

7. The Contract was silent on who would be responsible for the ordering and delivery of necessary materials to the job site. The Claimant understood that she would be paying for the materials, but it was not until after the Respondent began the Work that the Respondent informed her that she should be responsible for selecting and arranging for delivery of all materials.

8. The Respondent commenced the Work on or about November 5, 2009 and successfully completed Phase One of the Work.

9. The Respondent completed Phase Two of the Work, properly attaching stone veneer to the foundation of the Claimant's house, but his grouting did not hold up, requiring the Claimant to pay \$450.00 to Tag Masonry for regrouting.

10. The Respondent failed to complete Phase Three of the Work, in the following respects:

- He covered with stone only three and one-half of the four steps, leaving all of them wobbly and uneven
- He damaged the gutters and downspouts, from which all the brackets were damaged or missing
- His installation of stone over the front and back porches was too high to allow for the proper opening and closing of doors.

11. The Respondent failed to complete Phase Four of the Work and what little work he did had to be torn out and replaced.

12. The Respondent failed to consider that it was too late in the year to easily obtain the stone required or to lay concrete, without appropriate additives, or risk the concrete not setting properly.

13. Based on decisions made by the Respondent, the Claimant purchased and paid for far more stone and other materials than were required for the Work.

14. Because the Respondent failed to properly cover/maintain material, e.g., grout, the Claimant was compelled to purchase otherwise unnecessary replacement materials.

15. The Respondent failed to possess the proper tools for performance of the Work. In particular, the Respondent did not own, rent or borrow a proper saw to cut the stone. Consequently, the Respondent directed the Claimant to purchase a designated electrical saw for him, which was inadequate to cut the stone, causing the saw's motor to burn out and blow a fuse in the Claimant's home.

16. The Respondent and the Claimant had numerous debates over the selection and supply of materials for the Work, to the point at which the Respondent abandoned the job before it was completed.

17. The Respondent left trash, stone and dried/hardened cement under the Claimant's carport and all around the Claimant's walkway and yard.

18. In addition to paying for tools, materials and incidentals, the Claimant paid the following amounts to the Respondent for the Work:

11/9/09	\$ 100.00
11/13/09	150.00
11/14/09	1,030.00
11/17/09	1,250.00
11/21/09	<u>625.00</u>
TOTAL	\$3,155.00

19. The Claimant paid \$6,720.00 to Domenic Petrucci Contractors to complete the Work.

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that she incurred an actual loss, which resulted from a licensed contractor's acts or omissions. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." For the reasons set forth below, I conclude that the Claimant has met this burden, by proving that the Respondent failed to complete a workmanlike job and that the Claimant incurred an actual loss, entitling her to an award of \$1,000.50.

Section 8-405(d) of the Business Regulation Article provides that "[t]he Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." I find that the Claimant did not unreasonably reject any efforts to resolve the claim. The Respondent testified that he would have come back to complete the Work if the Claimant had assured him that all necessary materials would be waiting for him at the Property. I do not believe that the Respondent made the Claimant aware of any such intention to return. More importantly, the Claimant appropriately decided to finish the Work with another contractor because of the poor quality of the Respondent's installation of stone on the Claimant's porch and steps, his sloppy distribution of stone, trash and hardened cement all over the Claimant's Property, his lack of proper tools for the Work and his inability to provide proper direction and assistance to the Claimant concerning the supplies and materials to be purchased.

Consequently, I conclude that the Claimant has met her burden of proof and is entitled to an award from the Fund. Nevertheless, as the Fund's representative acknowledged at the hearing, the calculation of an appropriate award in this case is not without problems. Although the Claimant submitted a number of estimates for clean-up and completion of the Work, she provided no expert witness to testify at the hearing as to the value of the Work done by the Respondent or to answer questions about the estimates to repair/complete the Respondent's Work (e.g., the extent to which those estimates included materials that the Claimant would have been required to supply under the Respondent's Contract). To make matters worse, the Claimant did not employ any of the contractors who provided estimates. Instead, she chose to employ Domenic Petrucci Contractors to complete the Work for \$6,720.00 (as evidenced by her testimony and check), but produced no proposal, contract, statement or invoice from that company to describe the scope of the work.

With respect to awards against the Fund, COMAR 09.08.03.03B(b)(3) provides as follows:

B. Measure of Awards from Guaranty Fund.

....

(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. . . .

COMAR 09.08.03.03B(b)(1)(a) precludes the Fund from awarding any compensatory damages, such as the expenses incurred by the Claimant in this case to remove hardened cement and trash or to replace the gutters broken by the Respondent. Business Regulation Article § 8-405(e)(5) further provides that no claimant may be awarded “an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.”

COMAR 09.08.03.03B(b)(3)(a) is inapplicable because the Respondent did not abandon the Contract without doing any work. Furthermore, because no expert witness testified at the hearing, I have no basis to fairly value the Work that the Respondent properly performed, which would be necessary to calculate the Claimant’s actual loss under COMAR 09.08.03.03B(b)(3)(b). Moreover, I cannot use COMAR 09.08.03.03B(b)(3)(c) to calculate the Claimant’s actual losses because she failed to establish to a reasonable degree of certainty any reasonable amounts she paid or would be required to pay another contractor to repair and complete the Work.

COMAR 09.08.03.03B(b)(3) specifically allows me to apply a unique measurement if required by a particular claim and I have no other choice but to do so in this case. The Claimant acknowledged that the Respondent successfully completed Phase One of the Work. Except for a \$450.00 fee the Claimant paid for some regrouting, she failed to prove, by a preponderance of the evidence, any problem with the Respondent’s performance of the Work during Phase Two. The Claimant’s testimony, photographs and written statements from other contractors clearly establish that all of the Work under

Phases Three and Four was either incomplete or needed to be replaced. Accordingly I calculate the Claimant's actual loss as follows:

Payment for Work Performed Properly

\$ 1,250.00	Phase One of the Work
<u>+ 800.00</u>	Phase Two of the Work (\$1,250.00 – 450.00 for regrouting)
\$ 2,150.00	

Amount Paid by the Claimant to the Contractor

\$ 3,155.00	
\$ 3,155.00	
<u>2,150.00</u>	
\$ 1,005.00	The Claimant's Actual Loss

The Respondent stated that he offered the Claimant an "awesome price" for the Work he was to perform under the Contract. His statement is confirmed by the *much* larger estimates of other contractors to repair/complete the Work. While I sympathize with all of the aggravation that the Claimant underwent in her dealings with the Respondent, I cannot recommend an award of more than \$1,005.00 without adequate proof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant has met her burden of proving that she incurred an actual loss as a result of the Respondent's unworkmanlike and incomplete performance of home improvement work on the Claimant's Property. Business Regulation Article §§ 8-405(a) and 8-407(e)(1). The amount of that loss is \$1,005.00, which the Claimant should be awarded from the Fund. *Id.*; Business Regulation Article §§ 8-405(e)(5); COMAR 09.08.03.03B(3).

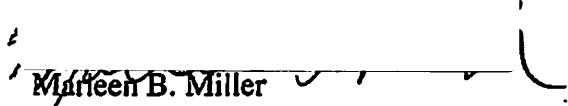
RECOMMENDED ORDER

Upon due consideration, I **RECOMMEND** as follows:

1. The MHIC ORDER that the Claimant, Lois Dicarlo, be awarded \$1,005.00 from the MHIC Fund, for the actual losses she sustained as a result of the Respondent's inadequate home improvement work;
2. The Respondent, Timothy Dauses t/a Fence Deck Tech, be ineligible for an MHIC license, under Business Regulation Article § 8-411(a), until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent; and
3. The records and publications of the MHIC reflect this decision.

Signature on File

January 18, 2013
Date decision mailed


Marleen B. Miller
Administrative Law Judge

MBMrbs
#139671

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FILE EXHIBIT LIST

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