

IN THE MATTER OF THE CLAIM	* BEFORE EMILY DANEKER,
OF GERTDELL GRANTER,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-18-36563
FOR THE ALLEGED ACTS OR	* MHIC No.: 18 (90) 482
OMISSIONS OF WILLIAM SMITH,	*
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 February 22, 2018, the Maryland Home Improvement Commission (MHIC) received a claim filed by Gertdell Granter (Claimant) seeking reimbursement from the Maryland Home Improvement Guaranty Fund (Fund) for \$1,977.06 in actual losses allegedly sustained as a result of the acts or omissions of home improvement contractor William Smith (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On November 26, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on April 15, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). The Claimant, who passed away while her claim was pending, was represented by

¹ Unless otherwise indicated, all citations to the Business Regulation article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

Michelle Granter Faltz, who is the Claimant's daughter and the personal representative of the Claimant's estate. (See Clmt. Ex. 1.) Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department),² represented the Fund. Neither the Respondent, nor anyone authorized to represent him, appeared for the hearing. I waited fifteen minutes past the scheduled hearing time³ and then proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

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. 2018); 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 on the Claimant's behalf:

Clmt. Ex. 1 - State of Maryland Letters of Administration, June 4, 2018

Clmt. Ex. 2 - Contract, June 30, 2017

Clmt. Ex. 3 - Photographs, undated

² Subsequent to the hearing date, the Department changed its name to the Department of Labor.

³ The case was originally scheduled to commence at 9:30 a.m. on April 15, 2019. Subsequently, the MHIC provided a second address for the Respondent and requested that the OAH send a notice of hearing to the Respondent at that address as well. When the OAH sent the notice to that new address, the time for the hearing was inexplicably changed to 10:00 a.m. on April 15, 2019. Although the Claimant was not cognizant of the change in time, I considered 10:00 a.m. as the scheduled hearing time.

Clmt. Ex. 4 - Contract, Twins Home Improvement LLC, October 2, 2018

Clmt. Ex. 5 - Estimate, Horizon Roofing, Inc., December 20, 2017

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 - Notice of Hearing, March 13, 2019

GF Ex. 2 - Hearing Order, November 21, 2018

GF Ex. 3 - Letter from the MHIC to the Respondent, February 27, 2018, with enclosed Home Improvement Claim Form, February 22, 2018

GF Ex. 4 - MHIC Licensing History for Respondent, dated March 13, 2019

No documents were submitted on behalf of the Respondent.

Testimony

Michelle Granter Faltz testified in behalf of the Claimant.

There were no other witnesses called to testify at the hearing.

PROPOSED 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 under MHIC license number 01-94367.
2. At all relevant times, the Claimant owned and resided in a home on Wildwood Parkway (Residence), in Baltimore, Maryland. She owned no other real estate in Maryland.
3. The Claimant was experiencing water intrusion at the Residence and she contacted the Respondent for roofing work.
4. The Respondent viewed the roof of the Residence and advised the Claimant as to the work that needed to be performed.

5. On June 30, 2017, the Claimant and the Respondent entered into a contract (Contract) for roof work at the Residence, which was to consist of:

1. Cleaning the flat roof and porch roof and patching the flat roof and porch roof, as needed, with roofing cement and membrane;
2. Coating the entire flat roof and porch roof with fibered aluminum coating silver, applied by brush;
3. Installing white aluminum fascia cover and under hang soffit across front over dormer fascia; and
4. Repairing mansard ridge all the way across roof using plastic roofing cement and membrane.

6. The Contract work was defined by the Respondent to address the Claimant's problem with water intrusion.

7. The original agreed-upon Contract price was \$2,500.00, which the Claimant paid in full on June 30, 2017.

8. The Respondent started work on the roof in July 2017.

9. The Respondent performed some patch work under the first item of the Contract.

10. The Respondent completed the second Contract item: coating the entire flat roof and porch with fibered aluminum coating silver, applied by brush.

11. The Respondent did not perform the work called for in item three of the Contract.

12. The Respondent performed some, but not all, of the work called for in item four of the Contract.

13. Following the Respondent's work, water continued to intrude through the roof of the Residence.

14. The Claimant contacted the Respondent about the continued leaks, but he did not respond.

15. On December 20, 2017, the Claimant obtained an estimate from Horizon Roofing, Inc. (Horizon) to: 1) "Install a new G.A.F. smooth surfaced 'touch' applied rubberoid roofing system over the entire top main flat roof, including all fire-walls and curbs"; and 2) "Install new rubber flashings to chimneys, curbs, walls, and collars." (Clmt. Ex. 5.) The estimated price of the work was \$2,700.00.

16. In or about January 2019, the Claimant's estate subsequently paid Twins Home Improvement LLC (Twins) \$5,475.00 to perform a full roof replacement of the flat roof and the porch roof at the Residence.

17. The Claimant was not related to the Respondent and was not a business affiliate of the Respondent.

18. Neither the Claimant nor her estate has brought any other action against the Respondent to recover for the acts or omissions raised in the claim.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to "the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

The MHIC's business address of record for the Respondent is 908 Lauren Way, Curtis Bay, Maryland 21226; this is also his home address of record with the MHIC. (GF Ex. 4.) On February 14, 2019, the OAH sent the Respondent a Notice of Hearing (Notice), advising that the hearing was scheduled for 9:30 a.m. on April 15, 2019, at the OAH's office in Hunt Valley, Maryland. The Notice was sent to the Respondent at 908 Lauren Way, but in Beltsville,

Maryland 20705, which is the address the MHIC provided to the OAH when it transmitted the matter for a hearing. The mailing was returned to the OAH marked "No such street." The OAH advised the MHIC of this, at which point the MHIC noticed the incorrect address was used. The MHIC provided the OAH with a corrected address and requested that the OAH reissue the Notice of Hearing to that address.

Accordingly, on March 13, 2019, the OAH sent a new Notice to the Respondent at his correct address of record, advising him that the hearing was scheduled for 10:00 a.m. on April 15, 2019 at the OAH in Hunt Valley, Maryland. (GF Ex. 1.) That Notice was sent to the Respondent by both certified mail and first class mail. On April 12, 2019, the postal service returned that first class mailing to the OAH marked "Not deliverable as addressed." The certified mail receipt card was never returned to the OAH.

The Respondent is obligated to keep the MHIC apprised of his current address. *See Md. Code Ann., Bus. Reg. § 8-309* (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent by first-class and certified mailing using the MHIC's last known home and business addresses for the Respondent. The method of notice to the Respondent was reasonably calculated to provide him with notice of the hearing and I concluded that the Respondent received proper notice of the hearing. *Md. Code Ann., Bus. Reg. §§ 8-312(d), 8-407(a)*; *Md. Code Ann., State Gov't § 10-209 (2014)*; *Board of Nursing v. Sesay*, 224 Md. App. 432 (2015). Therefore, the hearing proceeded in the Respondent's absence. *Md. Code Ann., Bus. Reg. §§ 8-312(d), (h), 8-407.*

II. The Merits of the Claim

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. *Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A*

homeowner is authorized to “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). The statutory scheme governing the Fund defines “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401.

At a hearing on a claim, a claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant’s burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so[,]” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

The sole witness at the hearing was Ms. Faltz. Her testimony made clear that she was familiar with the Residence as the personal representative of the Claimant’s estate and as the daughter of the Claimant. Notably in this regard, Ms. Faltz’s grandmother continues to reside in the Residence. It was apparent that she was dependent upon the Claimant’s notes for much, though not all, of her testimony concerning the work performed by the Respondent.

Although there were some areas where Ms. Faltz’s first-hand knowledge was limited, I find the evidence sufficient to establish entitlement to recover from the Fund. Ms. Faltz testified that the Claimant, her mother, contacted the Respondent “to do her roof,” that the Respondent went up onto the roof, the Respondent determined what work needed to be done to fix the roof, and he gave the Claimant a price. The evidence established that the purpose of the Contract was to address water intrusion at the Residence. It was the Respondent who told the Claimant what

work would be necessary for this purpose. Despite the Respondent's work, the leaks persisted. The Respondent did not respond to the Claimant's efforts to have him address the fact that the roof continued to leak. Indeed, less than six months later, the Claimant was seeking estimates from another roofing company to resolve the problem. (Clmt. Ex. 5.)

Ms. Faltz testified that, ultimately a full roof replacement was performed by Twins in January 2019, as the leaks were significant enough that the repair could not be delayed until the resolution of the Claimant's claim. Ms. Faltz explained that Twins determined that a full roof replacement was necessary to address the leaks. She testified that none of the roofers contacted were willing to perform a partial repair of the roof as an attempted remedy for the leaks. Ms. Faltz further testified that when Twins went onto the roof of the Residence, Twins observed areas that should have been shingled, but were not. Further, the pictures in evidence, taken by Twins during the course of its work, demonstrate that the roof was in poor condition. (Clmt. Ex. 3.) Underneath the shingled areas, portions of the wood structure had large holes and cracks. Accordingly, Twins replaced the entire roof in January 2019, and there have been no problems with water intrusion since then.

As noted, the Respondent advised the Claimant as to the scope of the work necessary to repair the leaking roof. The Respondent's work was insufficient, in both quality and scope, to remedy the leaking roof. The leaks persisted and the Respondent did not make any effort to remedy the work. In these circumstances, I find the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement and the Claimant is eligible to recover her actual loss from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a).

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. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). Additionally, a claimant may not recover more than the amount paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(5).

The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3)(a)-(c). However, none of the three regulatory formulas is appropriate in this case—although another contractor was solicited to perform the home improvement (repair of the roof to remedy the leaks), the work performed by the new contractor was, of necessity, broader in scope than the work the Respondent contracted to provide to the Claimant. Thus, it does not present an appropriate measure of damages. Accordingly, I shall apply a unique formula to measure the Claimant's actual loss. *See* COMAR 09.08.03.03B(3).

In this case, the Claimant received essentially no benefit from the Respondent's work—although the Respondent performed some work, it did not resolve the leaks, which were the very reason for the work; the Respondent made no effort to further remedy the situation; and ultimately the work he performed was entirely ripped out during the replacement of the roof a relatively short time later.⁴ The Claimant paid the Respondent \$2,500.00 and received no value. The Claimant attempted to provide the Respondent some credit for the materials he used, and thus she claimed only \$1,977.06 in recovery from the Fund, which is less than the Claimant paid to the Respondent. As the Claimant received no value under the Contract, I recommend that the Claimant be awarded the full amount claimed, \$1,977.06. This is consistent with the position taken by the Fund at the conclusion of the case. There are no statutory impediments to the claim. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1).

⁴ As noted above, the fascia and soffit work was never performed by the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant sustained an actual and compensable loss \$1,977.06 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover that amount from the Fund. COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,977.06; 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,⁵ and

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

Signature on File

July 15, 2019
Date Decision Issued

Emily Danecker
Administrative Law Judge

ED/cj
#180940

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of August, 2019, 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

RECEIVED
SEP 30 2019