

IN THE MATTER OF THE CLAIM OF	* BEFORE DANIEL ANDREWS,
KEVIN and HELEN HOLMBOE	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF ROBERT H. WALDRON	* OAH NO.: DLR-HIC-02-08-17774
T/A HOMETOWN REPAIR and REMODEL	* MHIC NO.: 05 (90) 977

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
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CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 17, 2007, Kevin and Helen Holmboe (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC or the Commission) Guaranty Fund (Fund) for the actual loss they allegedly suffered as a result of the acts and omissions of Robert H. Waldron t/a Hometown Repair and Remodel (Respondent). On April 18, 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 Claimants.

On June 8, 2009, I conducted a hearing at the Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Room 110, Annapolis, Maryland 21401, pursuant to the Maryland

Annotated Code's Business Regulation Article¹ section 8-407(a) (incorporating the hearing provisions of Business Regulation section 8-312). Kris King, Assistant Attorney General, appeared on behalf of the Fund. The Claimants represented themselves. 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 (2004 & Supp. 2008); 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 Claimants sustain an actual loss as a result of the Respondent's acts or omissions and, if so, what amount are the Claimants entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL Ex. #1: Contract between Claimants and Respondent, September 25, 2003
- CL Ex. #2: Letter from Claimants to Respondent, October 5, 2004
- CL Ex. #3: Photograph of water damage around electrical outlet in the kitchen and water damage in master bedroom door frame
- CL Ex. #4: Photograph of ceiling leak in master bedroom
- CL Ex. #5: Curriculum Vitae of Anthony J. Cusato
- CL Ex. #6A: Inspection report by Anthony J. Cusato, Rooftop Inspection Company, May 21, 2008
- CL Ex. #6B: Photograph of roof tiles

¹ 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 2008 Supplement to the Maryland Annotated Code, as appropriate.

- CL Ex. #6C: Photograph of chimney and flashing
- CL Ex. #6D: Photograph of roof tiles and weave pattern
- CL Ex. #6E: Photograph of roof tiles and weave pattern
- CL Ex. #6F: Photograph of roof tiles and joint caulking
- CL Ex. #6H: Photograph of roof tiles and valley weave pattern
- CL Ex. #6J: Photograph of roof membrane and flashing
- CL Ex. #6K: Photograph of roof valley and flashing
- CL Ex. #6L: Photograph of roof membrane and flashing
- CL Ex. #6M: Photograph of roof membrane and flat roof section
- CL Ex. #6N: Photograph of flashing around ventilation pipe and antennae
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- CL Ex. #6P: Photograph of new roofing tiles and old roofing tiles near gutter
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- CL Ex. #6W: Photograph of roof ridge cap ventilation tiles
- CL Ex. #6X: Photograph of roof ridge
- CL Ex. #6Y: Photograph of satellite dish support apparatus
- CL Ex. #6Z: Photograph of roof ventilation pipe flashing
- CL Ex. #7: RRH Associates estimate, May 16, 2007
- CL Ex. #8: Charis Home Improvements, Inc. estimate, December 11, 2008

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

Fund Ex. #1: Several Notices of Hearing mailed to the Respondent by certified mail-return receipt requested including:

- Notice of Hearing, dated August 15, 2008, for hearing on December 22, 2008, mailed to Respondent at 215 Hillsmere Drive, Annapolis, Maryland 21403 - Returned as undeliverable-unable to forward²
- Notice of Hearing, dated February 23, 2009, for hearing on May 14, 2009, mailed to Respondent at 315 Hillsmere Drive, Annapolis, Maryland 21403 – Returned as undeliverable-unable to forward and 11A Southway Road, Greenbelt, Maryland 20770 - with signed return receipt by Kevin Dingle
- Notice of Hearing (Corrected Copy), dated February 27, 2009, for hearing on September 4, 2009, mailed to Respondent at 315 Hillsmere Drive, Annapolis, Maryland 21403 – Returned as undeliverable-unable to forward and 11A Southway Road, Greenbelt, Maryland 20770- Returned as unclaimed.
- Notice of Hearing, dated March 25, 2009, for hearing on June 8, 2009, mailed to Respondent at 315 Hillsmere Drive, Annapolis, Maryland 21403, returned as not deliverable-unable to forward; also included is the Notice of Hearing, mailed by regular mail, returned as undeliverable-unable to forward.

Fund Ex. #2: Licensing History for Respondent with address of record including 315 Hillsmere Drive, Annapolis, Maryland 21403 and 11A Southway Road, Greenbelt, Maryland 20770

Fund Ex. #3: Home Improvement Claim Form filed by Claimants on May 17, 2007

Fund Ex. #4: Letter from the Commission to Respondent, August 1, 2007

Testimony

The Claimants testified on their own behalf and presented the testimony of Anthony Cusato. Mr. Cusato was accepted as an expert in the field of residential roofing. The Fund did not present any witnesses.

² The address of 215 Hillsmere Drive was an error. Consequently, the hearing was cancelled and new notices were issued using the correct address of record for the Respondent of 315 Hillsmere Drive.

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 # 01-75586.
2. On September 25, 2003, the Claimants entered into a contract with the Respondent to build an addition onto their home, which would include a new roof for the addition and joining the new roof with the existing roof structure. The contract price was \$114,327.50.
3. The Respondent began work under the contract on February 4, 2004, and completed the work on August 13, 2004.
4. The Claimants paid the full contract price of \$114,327.50.
5. The Claimants experienced water leakage issues and related damage in several areas of the new addition including the kitchen, master bedroom, and a mudroom crawlspace.
6. The Claimants attempted to contact the Respondent by telephone several times regarding the issues of water leakage but received no response, and the Respondent's phone number eventually became disconnected.
7. On October 5, 2004, the Claimants sent a letter to the Respondent's address, at 315 Hillsmere Drive, Annapolis, Maryland 21403, seeking to have the water leakage issues addressed immediately. The Respondent did not respond to this letter.
8. The Claimants have sought other licensed MHIC contractors to repair the work performed by the Respondent. On May 16, 2007, RRH Associates estimated the cost of repair would be \$10,918.00. On December 11, 2008, Charis Home Improvements, Inc., estimated the cost of repair would be \$14,300.00.

9. On May 15, 2008, Anthony J. Cusato of the Rooftop Inspection Company performed an inspection of the Claimants' roof and observed:

- The shingles are not fastened or installed according to the manufacturer's specifications;
- All new plumbing and ventilation pipe collars are installed incorrectly and must be replaced;
- The shingle installation pattern is not according to manufacturer's specifications;
- The shingles do not overhang the gutter edge as required by manufacturer's specifications and there is exposed plywood roof decking in some areas;
- All existing roof ridge vents are not properly installed and do not meet manufacturer's installation specifications;
- The shingles at the ridge sections where the ridge ties into the existing shingle roof and where the shingles are installed under the ridge vents are not correct or in accordance with manufacturer's specifications;
- All roof valleys are installed incorrectly and do not meet manufacturer's specifications;
- The metal flashing at the existing chimney was not replaced and coated with some type of paint;
- The metal flashings installed on the roof are not installed correctly and allow water to enter into the home; and
- The new flat roof section has a membrane which is not installed according to manufacturer's specifications.

10. Based upon the above inspection of the Respondent's work, the Claimants are required to remove all work performed by the Respondent and install a new roof according to manufacturer's specifications.

11. The Respondent's failure to properly install the Claimant's roof as required by manufacturer's specifications constitutes a home improvement in an unworkmanlike manner.

12. On May 21, 2008, Mr. Cusato estimated the cost to repair the work performed by the Respondent is \$14,200.00.

13. Under the original contract, the Claimants paid the Respondent a total of \$114,327.50. However, the cost to repair the work performed by the Respondent by another contractor is \$14,200.00. By adding these two figures together the total amount is \$128,527.50. However, by subtracting the original contract price, the Claimants' actual loss is \$14,200.00.

14. As of June 8, 2009, the Respondent's home improvement contractor's license was current until January 1, 2011 and the address of record with the MHIC includes a business address of 11A Southway Road, Greenbelt, Maryland 20770 and a residential address of 315 Hillsmere Drive, Annapolis, Maryland 21403.

DISCUSSION

The Respondent's Failure to Appear

A preliminary issue is whether the Respondent was provided due notice of the hearing. The OAH sent several different notices of the scheduled hearings, including the hearing of June 8, 2009, to the Respondent's business address of 11A Southway Road, Greenbelt, Maryland 20770 and his residential address of 315 Hillsmere Drive, Annapolis, Maryland 21403. The OAH has a regular practice of sending Notices of Hearings to a Respondent or Claimant by both regular first class mail and certified return receipt requested mail. On one occasion, a Notice of Hearing, dated February 23, 2009, mailed to the Respondent's business address was received by a person identified as Kevin Dingle. However, as to all other notices of hearing dates, the copy of the Notice of Hearing mailed to the Respondent's business or residential address by certified return receipt requested mail, was returned by the postal authority as undeliverable and unable to forward. However, except for the last Notice of Hearing date, the OAH file does not contain a return of service for the copy of the Notice of Hearing mailed to the Respondent by regular first

class mail. Nonetheless, the Respondent is not entitled to actual notice but only due notice and an opportunity for a hearing.

Business Regulation section 8-312(a) provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. After prior hearing dates were scheduled, a final hearing was scheduled on June 8, 2009, at 10:00 a.m.; however, the Respondent failed to appear for the hearing. Under Business Regulation section 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.”

In this case, the Respondent is a licensed home improvement contractor with the MHIC. He is licensed under contractor license number 01-75586, which as of June 8, 2009 was current until January 1, 2011, and the address of record with the MHIC includes a business address of 11A Southway Road, Greenbelt, Maryland 20770 and a residential address of 315 Hillsmere Drive, Annapolis, Maryland 21403. The Respondent’s residential address also became the Respondent’s business address of record with the MHIC on July 3, 2003. The Respondent’ also notified the MHIC of a bankruptcy filing on November 6, 2007 using the address of 315 Hillsmere Drive, Annapolis, Maryland 21403.

Based upon the evidence before me, I am satisfied that the Commission provided due notice to the Respondent of the scheduled hearing, including the date, time and location of the 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 Guaranty Fund, “for an actual loss that results from an act or omission by a licensed contractor....” Business Regulation § 8-405. Section 8-401 of the Business Regulation Article defines “actual

loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." The Claimants bear the burden of proof, which is by a preponderance of the evidence, that they are entitled to reimbursement from the Guaranty 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(e)(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 September 25, 2003, the Claimants entered into a contract with the Respondent to build an addition onto their home and to install a roof system that would match the existing roof. The total contract price was \$114,327.50. On February 4, 2004, the Respondent began the work required under the contract and completed the work on August 13, 2004. Consequently, the Claimants paid the Respondent the full contract price. However, the Claimants began noticing water damage in several areas of the new addition. The Claimants made several telephone calls to the Respondent to notify him of the issues and to have them addressed immediately. However, the Respondent never returned the Claimants' telephone calls. On October 5, 2004, the Claimants sent the Respondent a letter identify their complaints with his work performance. Again, the Respondent did not respond to the Claimants' complaints. Consequently, the Claimants sought estimates from several contractors to repair the work performed by the Respondent.

On May 21, 2008, Anthony J. Cusato, of Rooftop Inspection Company, inspected the roof installed by the Respondent at the Claimants' residence. Mr. Cusato was accepted as an expert in the field of residential roof installation. He offered several observations of the Respondent's unworkmanlike performance regarding the roof installed under the contract between the Claimants and Respondent. Mr. Cusato observed the following, all of which are corroborated by photographs:

- The shingles are not fastened or installed according to the manufacturer's specifications;
- All new plumbing and ventilation pipe collars are installed incorrectly and must be replaced;
- The shingle installation pattern is not according to the manufacturer's specifications;
- The shingles do not overhang the gutter edge as required by the manufacturer's specifications and there is exposed plywood roof decking in some areas;

- All existing roof ridge vents are not properly installed and do not meet the manufacturer's installation specifications;
- The shingles at the ridge sections where the ridge ties into the existing shingle roof and where the shingles are installed under the ridge vents are not correct or in accordance with the manufacturer's specifications;
- All roof valleys are installed incorrectly and do not meet the manufacturer's specifications;
- The metal flashing at the existing chimney was not replaced and coated with some type of paint;
- The metal flashings installed on the roof are not installed correctly and allow water to enter into the home; and
- The new flat roof section has a membrane which is not installed according to the manufacturer's specifications.

Based upon the above observations, Mr. Cusato opined that the Respondent installed the roof in an unworkmanlike manner and to remedy the situation the Claimants are required to remove all the work performed by the Respondent and reinstall a new roof at a cost of \$14,200.00. Since Mr. Cusato's observations and opinion are corroborated by detailed photographic evidence, I accept his opinion as persuasive evidence that the Respondent installed the Claimants' roof in an unworkmanlike manner and that the Claimants did sustain an actual loss. Business Regulation §§ 8-401 and 8-405. Therefore, I find that the Claimants are entitled to compensation from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). As noted earlier, COMAR 09.08.03.03B(3) provides three formulas to determine the amount of actual loss sustained by a claimant. In this case, I find it appropriate to use the actual loss calculation as stated by 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 Claimants paid the Respondent a total of \$114,327.50. The Claimants have sought other contractors to repair the work performed by the Respondent. In May of 2007, RRH Associates provided an estimate of \$10,918.00 to repair the Claimants roof. On December 11, 2008, Charis Home Improvements, Inc. estimated the cost of repair to be \$14,300.00. However, on May 21, 2008, Mr. Cusato estimated the cost of repair to be \$14,200.00. The Fund, through its attorney, did not object to the estimate presented by Mr. Cusato. Therefore, since this estimate is based upon a detailed evaluation of the work performed by the Respondent and is not contested by the Fund, I shall find that the cost of repair by another contractor is \$14,200.00. Consequently, under the formula, by adding together the original contract price and the cost of repair, the subtotal is \$128,527.50. Finally, by subtracting the original contract price, I calculate that the Claimants sustained an actual loss because of the Respondent's unworkmanlike home improvement in the amount of \$14,200.00.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimants have met their burden of proof and established that they incurred an actual loss as a result of the Respondent's unworkmanlike home improvement. Business Regulation §§ 8-405(a) and 8-407(e)(1). Additionally, the Claimants established an actual loss in the amount of


\$14,200.00. Business Regulation § 8-405(e)(1). The Claimants are entitled to an award of that amount from the Fund.

RECOMMENDED ORDER

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

1. The **MHIC ORDER** that the Claimants, Kevin and Helen Holmboe, be awarded \$14,200.00 from the MHIC Fund, for the actual losses they sustained as a result of the Respondent's unworkmanlike home improvement;
2. The Respondent, Robert H. Waldron t/a Hometown Repair and Remodel, be ineligible for an MHIC license, under Business Regulation § 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 (10%); and
3. The records and publications of the MHIC reflect this decision.

September 8, 2009
Date Decision Mailed


Daniel Andrews
Administrative Law Judge

DA/ch
107957

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KEVIN and HELEN HOLMBOE	* AN ADMINISTRATIVE LAW JUDGE
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FILE EXHIBIT LIST

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³ The address of 215 Hillsmere Drive was an error. Consequently, the hearing was cancelled and new notices were issued using the correct address of record for the Respondent of 315 Hillsmere Drive.

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Fund Ex. #3: Home Improvement Claim Form filed by Claimants on May 17, 2007

Fund Ex. #4: Letter from the Commission to Respondent, August 1, 2007

PROPOSED ORDER

WHEREFORE, this 27th 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.

Rossana Marsh

Rossana Marsh

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION