

<p>IN THE MATTER OF THE CLAIM</p> <p>OF DIANA L. PHELPS,</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 WADE S. DRAKE,</p> <p>T/A TUFF TURF, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE LORRAINE E. FRASER,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH NO.: DLR-HIC-02-13-45942</p> <p>* MHIC NO.: 13(90)379</p> <p>*</p> <p>*</p> <p>*</p>
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On April 8, 2013, Diana L. Phelps (Claimant), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$1,275.00 for actual losses allegedly suffered as a result of a home improvement contract with Wade S. Drake t/a Tuff Turf, Inc. (Respondent).

I held a hearing on May 6, 2014 at the Talbot County Public Library in Easton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). Erik B. London,

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1 Home improvement contract between the Claimant and the Respondent, 8/14/11; Comanco, Inc., Architectural Change Application
- Cl. Ex. 2 Cancelled checks for \$1,507.00, 10/4/11; and \$2,000.00, 10/25/11
- Cl. Ex. 3 Town of Easton Fence Permit, 10/7/11
- Cl. Ex. 4 Emails between the Claimant and the Respondent, 8/23/12-9/19/12
- Cl. Ex. 5 Not admitted
- Cl. Ex. 6 Eight photographs of fence, taken 9/18/12
- Cl. Ex. 7 Estimate, Advance Construction, 9/28/12; Proposal, Handy Pro, 10/10/12; Project Proposal, Chuck's Creative Carpentry, Inc., 9/25/12
- Cl. Ex. 8 Contract, Handy Pro, 10/13/12; Change Order, 10/15/12; Change Order, 1/21/13; cancelled checks for \$390.00, 10/17/12; \$375.00, 10/10/12; \$400.00, 10/16/12; \$110.00, 1/23/13

Cl. Ex. 9 Letter from Keith Osterman, Handy Pro, to the Claimant, 10/20/12

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 Notice of Hearing, 2/27/14

Fund Ex. 2 Hearing Order, 11/20/13

Fund Ex. 3 The Respondent's Licensing History, 1/2/14

Fund Ex. 4 Home Improvement Claim Form, 4/8/13

Fund Ex. 5 Letter to the Respondent from John Borz, Chairman, MHIC, 4/17/13;

I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 Estimate for brick patio, 8/22/12; email from the Claimant to the Respondent, 8/19/12

Resp. Ex. 2 Letter to the Claimant from Michelle Escobar, Investigator, MHIC, 3/27/13; letter to the Claimant from Ms. Escobar, 12/17/12; letter to MHIC from the Respondent, 4/25/13; Order to the Respondent from MHIC, 10/17/12; Complaint form, 10/3/12; letter to MHIC from the Respondent 11/1/12; Express mail receipt, 11/2/12; home improvement contract, 8/14/11; Comanco, Inc., Architectural Change Application; fence permit and plan review residential receipts, 9/21/11; two photographs of fence; emails between the Claimant and the Respondent, 8/23/12-9/18/12; letter from Taushlyn Higgins, Retail Manager, Mid-Atlantic Deck & Fence Co., Inc.; diagram of vinyl fencing and post; Warranty Homeland Vinyl Products, Inc.

Testimony

The Claimant testified and the Respondent testified. The Fund did not present any testimony.

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 numbers 01-67053 and 05-51071. His license expired June 26, 2013 and has not been renewed.

2. On August 14, 2011, the Claimant and the Respondent entered into a contract to build a vinyl fence on the rear of the Claimant's property.
3. The original agreed upon contract price was \$3,507.00.
4. On October 4 and 25, 2011, the Claimant paid the Respondent a total of \$3,507.00.
5. In October 2011, the Respondent built the fence on the Claimant's property. The fence was made of solid panels, with no gaps in between, and vinyl posts. There was no metal or wood support inside the vinyl posts.
6. The Respondent installed the fence with the bottom rails on the ground; there was no gap between the bottom of the fence and the ground to allow for air flow. He also installed the gate at ground level, which made the gate difficult to open without digging out the dirt underneath it. In addition, he spray painted the screws white to match the vinyl fencing. There were runs in the paint on the vinyl fencing.
7. By August 2012, the fence and fence posts were buckling and bent away from the Claimant's yard. The length of the fence on one side was leaning away from the Claimant's yard and house, and as a result, the gate was misaligned.
8. Sometime in August 2012, the Claimant contacted the Respondent and asked him to repair the fence. She also asked for an estimate to build a patio.
9. On August 24, 2012, the Claimant emailed the Respondent asking him when he would repair her fence and how he would repair it.
10. On September 10, 2012, the Claimant emailed the Respondent noting that he had sent her a text message saying he was going to repair the fence the previous weekend and asking him when he would repair her fence, to give her a price for repairing it, and to give her the details of how it would be repaired.

11. On September 18, 2012, the Claimant emailed the Respondent telling him that she had four contractors look at the fence, summarizing their proposed repairs, reminding him that he warranted his work, asking him if he would repair the fence so that it would be stable, and noting that the contractors had suggested she report the problems with her fence to the MHIC.
12. On September 19, 2012, the Respondent and the Claimant exchanged a series of heated email messages. The Respondent stated that he was going to fix the fence but now would not do so. He also alleged that the damage was as a result of a storm or an act of vandalism.
13. On September 25 and 28 and October 10, 2012, the Claimant obtained three estimates from other contractors to repair her fence.
14. On October 13, 2012, the Claimant contracted with Handy Pro to repair the fence. The repair included: digging out the five damaged posts and their concrete footings, installing five new posts – wood posts covered by PVC – in new concrete footings, and reassembling the fence. The contract price was \$1,125.00.
15. On October 15, 2012, the Claimant and Handy Pro agreed to a change order to replace a damaged bottom rail for \$40.00.
16. On January 21, 2013, the Claimant and Handy Pro agreed to a second change order to install a brace to support the sagging gate and to adjust the gate and latch. The price to fix the gate was \$110.00.
17. The total cost to repair the fence was \$1,275.00.
18. The Claimant' actual loss is \$1,275.00.

DISCUSSION

An owner may 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) (Supp. 2013). *See also* COMAR 09.08.03.03B(2). Actual loss “means 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 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Second, the Respondent’s home improvement work installing the Claimant’s fence was unworkmanlike. Specifically, the Respondent installed the solid vinyl fence with the bottom rails and gate at ground level without a gap between the bottom of the fence and the ground. Also, the Respondent spray painted the screws leaving runs of paint on the vinyl. The Respondent’s installation made the gate difficult to open without digging out the dirt beneath it. More importantly, the Respondent’s installation of the fence at ground level essentially created a solid vinyl wall with no room between the bottom of the fence and the ground for air to flow. The fence panels themselves were solid, thus air could not flow between slats. The fencing material, including the posts, were vinyl and did not have anything stronger such as metal or wood to support the posts. It is quite likely that typical winds could have created enough pressure against this solid vinyl fence to bend the vinyl supports. Had the Respondent installed the fence a few inches from the ground, air could have moved freely under the fence as well as over it and the supports would not have bent.

While the Respondent claimed that a storm or vandals damaged the fence, he did not present any credible evidence to support his claim. For example, there was no evidence presented of storm damage to the Claimant's home or surrounding homes or fences. Further, there was no evidence vandals damaged the Claimant's home or other property in the area. Moreover, if vandals were intent on causing damage to the Claimant's fence, it seems likely they would have caused much more serious damage to the fence. The Claimant's fence was less than a year old and was buckling and leaning outward. I find that it is more likely than not that the problems with the Claimant's fence were caused by the Respondent's improper installation.

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

(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(3)(c).

In this case, the Claimant's actual loss can be calculated from her contract with Handy Pro to repair the fence. Handy Pro repaired only the damaged portions of the fence, not the whole fence, which I find reasonable. The Claimant's actual loss is calculated as follows:

Amount paid to the Respondent under the contract	\$3,507.00
Cost of repairs	+ 1,275.00
	\$4,782.00
Amount of original contract	- 3,507.00
Actual loss	\$1,275.00

The Claimant's actual loss is \$1,275.00. As a result, the Claimant is entitled to an award of \$1,275.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$1,275.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010); COMAR 09.08.03.03B(3)(c). The Claimant is entitled to an award of \$1,275.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405 (e)(1) and (5) (Supp. 2013).

RECOMMENDED ORDER

I PROPOSE that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,275.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

July 24, 2014
Date Decision Mailed

Lorraine E. Fraser
Administrative Law Judge

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PROPOSED ORDER

WHEREFORE, this 26th of September 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

W.M. Bruce Quackenbush, Jr.
WM. Bruce Quackenbush, Jr.
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION