IN THE MATTER OF THE CLAIM	*	**BEFORE EMILY DANEKER,**
OF NELLO IENZI,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: DLR-HIC-02-15-03911**
OMISSIONS OF JOSEPH RYBA,	*	**MHIC No.: 14 (90) 708**
T/A JOE RYBA ROOFING & HOME	*	
IMPROVEMENTS,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 15, 2014, Nello Ienzi, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $3,825.00 in alleged actual losses suffered as a result of a home improvement contract with Joseph Ryba, trading as Joe Ryba Roofing & Home Improvements (Respondent).

I held a hearing on May 29, 2015 at the Office of Administrative Hearings (OAH), in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. The Respondent represented himself. Kris King, Assistant Attorney

General, Department of Labor, Licensing and Regulation (DLLR or Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:[1]

Clmt. Ex. 1 - Correspondence from the Claimant, as follows:
- December 1, 2013 letter to the Respondent
- December 23, 2013 letter to the MHIC
- February 18, 2014 letter to the MHIC
- June 26, 2014 letter to the MHIC
- May 1, 2015 letter to the MHIC

Clmt. Ex. 2a to k - Photographs of the Claimant's residence

Clmt. Ex. 3 - Proposal from the Respondent to the Claimant, dated November 15, 2011, with attached invoice

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Letter from Todd Burrows, CertainTeed Roofing Products Group, to Respondent, dated May 28, 2015

Resp. Ex. 2 - CertainTeed shingle of the type used on the Claimant's house

[1] The Claimant also offered an estimate from Sears to support the amount of his claim. I sustained the Respondent's and Fund's objections to the admissibility of this document. I also sustained the Fund's objection to the admissibility of a business card offered by the Claimant.

Resp. Ex. 3 - Portion of printout from the website "Inspectapedia," printed May 25, 2015

Resp. Ex. 4.1 -Illustration of the Respondent's roofing process at the Claimant's residence[2]

Resp. Ex. 7[3] - Letter from the Respondent to the MHIC, dated January 27, 2014

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, mailed April 2, 2015

Fund Ex. 2 - Hearing Order, dated January 27, 2015

Fund Ex. 3 - Respondent's Licensing Record, printed May 21, 2015

Fund Ex. 4 - Home Improvement Claim Form, received July 15, 2014

Fund Ex. 5 - Letter from the DLLR to the Respondent, dated July 30, 2014

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf and was permitted to offer testimony as an expert in siding. The Fund did not present any witnesses.

PROPOSED 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 number 01-17590.

2. At all relevant times, the Claimant was the owner of a home located at 13300 Darnestown Road (Residence) in Darnestown, Maryland, which was his primary residence. He

[2] The Respondent's exhibits 4.2 to 4.6, per the Respondent's testimony, are photographs of various defective methods of roofing, which the Respondent found in online searches. These photographs are not of the Claimant's house or the Respondent's work and are not reflective of the roofing methods employed by the Respondent. Accordingly, I sustained the Claimant's and Fund's objections to the admission of these documents.

[3] Respondent's exhibit 5 is a printout from "Checkbook" reflecting customer ratings for the Respondent and other local roofers. Respondent's exhibit 6 is a printout from the Maryland Judiciary Case Search reflecting lawsuits to which the Claimant was a party. I sustained the Fund's objections to the admission of these exhibits, as exhibits lacked probative value.

has lived at the Residence for approximately twenty-five years. The Claimant owns one other dwelling.

3. On November 30, 2011, the Claimant and the Respondent entered into a contract to remove and replace shingles on the roof of the Residence, replace flat roofing, inspect sheathing, install ice and water guard membrane, install painted aluminum pipe collars and step flashing, install a single vent and ridge vent system, and clean the gutters.

4. The contract stated that work would begin by December 5, 2011 and would be completed by approximately December 6, 2011.

5. The work to be performed included the replacement of shingles on a covered entrance located on the right side of the Residence.

6. The original agreed-upon contract price was $7,122.00. The parties subsequently agreed to increase the contract price by $600.00, to $7,722.00, for additional plywood for the job.

7. The Claimant paid an initial deposit in the amount of $2,122.00 and paid the remaining amount due, $5,600.00, upon the Respondent's completion of the work.

8. In the spring of 2012, after the work was complete, the Claimant observed water leaking through a light fixture in the covered entrance and through the siding on the left side of the entryway and through the right side of the "foot step" to the door at the covered entrance.

9. The Respondent returned to the Residence three times between the spring of 2012 and December 4, 2013 to attempt to remedy the leaks. The leaks persisted.

10. The Respondent left cellophane tape on the shingles when he installed them on the roof of the Residence. In some locations along the edge of the roof, the cellophane tape now hangs from the shingles.

11. The Claimant has not filed legal proceedings against the Respondent relating to this work and he has not filed an insurance claim arising from this work.

12. The Claimant filed his Claim with the MHIC on July 15, 2014.

DISCUSSION

Relevant Law

In 1985, the Maryland General Assembly enacted legislation that established the Fund. This legislation created 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 (2015).[4]

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). The statutes and regulations governing the Fund define "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement"; thus making clear that a compensable "act or omission" is synonymous with an "unworkmanlike, inadequate, or incomplete home improvement." *Compare* Md. Code Ann., Bus. Reg. § 8-401, *with* Md. Code Ann., Bus. Reg. § 8-405(a). Moreover, through the definition of "actual loss," the legislature limited the scope of recovery from the Fund to the categories of costs enumerated in section 8-401. *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629 (1997) (for an award to be paid from the Fund based on a court ruling or arbitration, the court or arbitrator's decision must contain express

[4] Although the events concerning the Claim span a period of years from late 2011 to the present, the substantive law governing the Claim has not been amended since 2011. Thus, for consistency, all citations are to the 2015 Replacement Volume of the Business Regulations article.

finding of fault on the part of the contractor and a dollar value of the actual loss).[5] "The Fund may only compensate for actual losses [a claimant] incurred as a result of misconduct by a licensed contractor." COMAR 09.08.03.03B(2).

There are other limitations on a claimant's recovery from the Fund as well. For instance, there is a $20,000.00 per claim cap on recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1). Further, a claimant cannot recover an amount in excess of the amount that paid to the contractor and cannot recover for consequential damages. Md. Code Ann., Bus. Reg. § 8-405(e)(3), (5). Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that, at all relevant times: (a) the claimant owned fewer than three dwelling places; (b) the work at issue concerned the claimant's personal residence in Maryland; (c) the claimant was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (i) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1) and (2).

[5] Under this statutory scheme, all licensed contractors are assessed for the monies that subsidize the Fund. When the Fund pays out money to a homeowner as a result of a faulty or incomplete performance by a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of such contractor until the contractor fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

At a hearing on a claim, the 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); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). 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 County Police Dep't*, 369 Md. 108, 125 n.16 (2002).

The Claimant Failed to Establish any Compensable Act or Omission by Respondent

The Claimant asserted two distinct omissions by the Respondent for which he sought recovery from the Fund. The first alleged omission was the Respondent's failure to remove pieces of cellophane tape from the shingles, resulting in a bothersome "flapping" noise on windy days. The second alleged omission was the Respondent's failure to adequately perform the roofing work such that a leak developed in the covered entrance on the right side of the Residence.

The evidence clearly establishes the prerequisites for recovery from the Fund: the Respondent was a licensed contractor at all times relevant to this dispute, (*see* Fund. Ex. 3); the contract between the parties did not contain an arbitration clause, (*see* Clmt. Ex. 3); the Claim was filed within three years of the date of the work, (*see* Clmt. Ex. 3; Fund Ex. 4); the Residence was the Claimant's personal, existing, residence and he owns only one other home; the Claimant is not a relative or employee of the Respondent; the Claimant did not reject the Respondent's efforts to resolve the claim; there is no pending insurance claim or litigation arising out of this work. (Testimony of Claimant.) However, for the reasons set forth below, I find that the Claimant has not established that he has a compensable claim against the Fund.

A. The Respondent did not engage in an inadequate, unworkmanlike, or incomplete repair by leaving cellophane tape on the shingles.

At the hearing, the Claimant testified that the Respondent left strips of cellophane on the shingles when he installed them and those strips are hanging from the shingles in many locations. When the roof was installed, the Claimant asked the Respondent about the removal of these strips and was told that the strips would eventually degrade and break off. The Claimant contends that he and his wife are disturbed by the noise created when the wind blows these strips of cellophane, and this limits their ability to enjoy the outside areas of their property on windy days. The strips are also visually displeasing to the Claimant and he is concerned that the hanging strips may have some implication for the structural soundness of the roof.

The Claimant introduced photographs depicting these cellophane strips hanging in various locations on the shingled roof of the Residence. (*See* Clmt. Ex. 2e-k.) The Claimant testified that some of these cellophane strips were fifty feet above ground level. He acknowledged that the cellophane strips say, "Do Not Remove." Nevertheless, the Claimant believed it was common sense that these strips should be removed. He has not had the strips

removed and has no estimate for the cost to remove these strips.[6] He offered no evidence, other than his own belief, that removal of the strips was required in order for the roofing work to be considered workmanlike, adequate, and complete.

The Respondent testified that the cellophane strips are designed to be left on the shingles and that they degrade and dissipate over time. In further support of his position, the Respondent introduced a shingle of the same type used on the roof of the Claimant's Residence. The cellophane tape on that shingle repeatedly advises: "Do Not Remove This Tape." (*See* Resp. Ex. 2.)

The Respondent also provided a letter from CertainTeed, the manufacturer of the shingles used on the Residence.[7] The May 28, 2015 letter that the Respondent obtained from CertainTeed[8] explains:

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[6] The Fund noted that in order to submit a claim, a claimant is required to specify the cost to repair or complete the work done by the original contractor. *See* COMAR 09.08.03.02A(1);(*see also* Fund Ex. 4). It argued that the cost to remedy the hanging strips of cellophane was outside the scope of the Claimant's Claim because he had not included any specific amount for that work when he filed his Claim. Thus, it contended, for this reason alone, I should deny recovery for any actual loss related to the cellophane strips.

As part of the claim process, a claimant is required to provide a "detailed explanation of the facts and circumstances giving rise to [the Claim]." (*See* Fund Ex. 4 at line 13); *see also* COMAR 09.08.03.02A(2). The Fund did not include such a statement from the Claimant as part of its exhibits. (*See* Fund Ex. 4 (single page Home Improvement Claim Form).) The Claimant, by contrast, provided a letter he sent to the MHIC, predating his Claim, in which he specifically references a concern with the strips of cellophane hanging from his roof. (Clmt. Ex. 1 (letter of February 18, 2014).) Further, I note that the Respondent was aware of the concern with the cellophane tape, as he came to the hearing prepared to address that issue, (*see* Resp. Exs. 1-3); this further suggests that all parties understood this to be within the scope of the Claim.

There was no argument that the amount claimed by the Claimant was insufficient to cover the cost to remedy the issue with the cellophane strips. Thus, the issue is really whether the cellophane strips were factually included within the Claim. Though the absence of a specific loss attributable to remedying the cellophane strips may be unusual, as a whole, the record before me evidences that the Claimant raised this issue in his Claim. There was no documentation to the contrary. Accordingly, I will consider the merits of the Claim as concerns the strips of cellophane.

[7] (*See* Clmt. Ex. 3 (calling for installation of CertainTeed Landmark "Lifetime Warranty" shingles in Mojave Tan).)

[8] The Respondent testified that he requested this letter from CertainTeed for use at the hearing. The letter is on CertainTeed's letterhead and is signed by Todd Burrows, who identifies himself as the Washington, D.C. area territory manager for CertainTeed's Roofing Products Group. Mr. Burrows has also provided his work email address.

> The release tape on our shingles is used for two different reasons. One reason is to keep shingles from sealing together while still wrapped in the bundles, and to allow for ease of separation when removing them from the bundle. The second reason is to encode our manufacturing data on each shingle for use in identification of each product, and also as a reference when we have a product defect. The tape specifically states "Do Not Remove" in order to maintain the manufacturing data on each shingle for potential future use. Release tape on shingles has no bearing on the products ability or inability to seal on a roof once installed.

(Resp. Ex. 1.) As CertainTeed is not a party to this matter, as Mr. Burrows has an independent business duty to CertainTeed to accurately represent its roofing products, and as CertainTeed would have no interest in concealing or facilitating the incorrect installation of its product, I gave this letter substantial weight.[9]

The Respondent presented significant evidence that the cellophane strips were designed to be left on the shingles after they were installed. He testified based on his years in the roofing industry that the cellophane tape is not to be removed. His testimony was supported by the tape itself, and the letter from the manufacturer. The only evidence presented by the Claimant to support his position that the cellophane should have been removed during the installation process is his own belief that this is common sense. The Claimant has not shown, by a preponderance of the evidence, that by leaving the cellophane tape on the shingles, the Respondent engaged in an inadequate, unworkmanlike, or incomplete home improvement. Even if the Claimant had established this element of his Claim, the Claim would fail for the further reason that there was no evidence of the cost to remove these cellophane strips from his roof; that is, there was no evidence as to the amount of any "actual loss." *See Brzowski*, 114 Md. App. at 629.

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[9] By contrast, I gave no weight to the Respondent's Exhibit 3, a portion of a printout from the website "Inspectapedia." Although no party objected to the admission of this document and hearsay is admissible in administrative hearings, this is not the type of document that a reasonable and prudent person would rely upon in conducting his affairs. Md. Code Ann., State Gov't § 10-213(b) (2014). In this regard, the document is an excerpt from a website of unknown authority. There is no information as to the website's interest in the matter, its affiliations, or the expertise of the person who drafted the information for the website.

B. The Claimant did not establish that his roof leak was the result of an inadequate, unworkmanlike, or incomplete repair by the Respondent.

The Respondent replaced the entire roof on the Residence, including both a shingled section and a flat roof. The leak at issue is confined to a relatively small covered entryway on the right side of the Residence. (*See* Clmt. Ex. 2a.)

The Claimant testified that prior to the Respondent's work, there was no leak in the covered entryway. He further testified that during the first heavy storm after the work was complete, he observed water coming through the light fixture on the underside of the roof to the covered entrance, through the siding on the left side of it, and through the right side of the "foot step" of the door.

The Claimant testified that he contacted the Respondent about the leaks and in response, the Respondent sent workers back to the Residence. This was in the spring of 2012. (*See* Clmt. Ex. 1 (letter dated December 1, 2013).) The workers used a hose to test for leaks and caulked along the roof and siding. After the caulk dried, the Claimant performed his own hose test and observed that the leaks persisted. He contacted the Respondent again and, per the Respondent's testimony, the Respondent sent a crew out to replace the shingles on the small covered entryway.[10]

The Claimant testified he met with a representative of Seneca Creek Roof-Siding Company (Seneca) concerning repair of the leak and the representative from Seneca advised him to contact the Respondent because the shingles were not properly installed along the j-channel. The Claimant also testified that he was told[11] that the entryway was leaking because it did not have a drip-edge. Based on Seneca's recommendation, approximately two years after the roof

[10] By the time of the hearing, neither the Claimant nor the Respondent could recall the dates when work was performed. Some of those dates were documented in the exhibits; however, the date of this repair attempt was not specified.

[11] It was unclear who it was that told the Claimant this.

was completed, the Claimant again contacted the Respondent about the leak in the covered entryway. (*See* Clmt. Ex. 1 (letter dated December 1, 2013).) In response, the Respondent returned to the Residence on December 4, 2014 and cut slots in the siding so that he could extend the flashing to ensure the water was flowing outside of the siding envelope. The leak continued. Moreover, the Claimant testified that the Respondent cut holes in the siding, separate from the slots cut for the flashing. These holes are visually disturbing to the Claimant and his wife.

In his testimony, the Respondent explained that he repeatedly attempted to fix the leak because he wanted to satisfy the Claimant, and his subsequent repair attempts were not an acknowledgement that his work was faulty. The Respondent testified that a drip edge was not required and that in subsequent discussion with the Claimant, the Claimant acknowledged that a drip edge was not required. The Respondent also demonstrated the method in which the roof was shingled and testified that it was proper.

Based on his twenty-five years of experience installing siding on homes, his continued work in the siding field, and his participation in manufacturer seminars, the Respondent was qualified as an expert in siding. He testified that based on his familiarity with the Residence (from his roofing work), his awareness that the Claimant had issues with the siding and rotting wood on the other side of the Residence, and his expertise in siding, it is his opinion the leak is the result of water backing up behind the siding because there was no soffit or overhang. The Respondent testified that he informed the Claimant that he believed the issue was with the siding, not the roof, after he returned to the property to address the leak for the second time. The Respondent observed that the original contract was simply to replace the roofs, which he contends he did in a proper manner, and was not to investigate and determine the cause of any water intrusion at the Residence.

The Respondent denied putting holes in the siding, beyond the two slots he made on the underside of the siding when he extended the flashing. He testified that those holes were already there and that he simply cleaned caulk out of them, which made them more noticeable.

Although the Claimant presented credible circumstantial evidence to suggest that the leak was caused by the Respondent's roofing work—including the timing of the leak and the Respondent's repeated attempts to repair the leak—this is not sufficient to sustain his burden. The cause of the leak in the covered entryway is a matter that requires expert testimony under the facts of this case. Indeed, the Claimant himself offered two separate reasons for the leak—the improper installation of the shingles along the j-channel and the lack of a drip edge. The Respondent offered a credible third opinion on the cause of the leak, one which was entirely unrelated to the roofing work. This clearly demonstrates that the cause of the leak is a matter that is not within the knowledge of the average layperson and instead requires specialized knowledge or expertise. Although a representative from Seneca purportedly viewed the Respondent's roofing work and opined that it was inadequate and the cause of the leak, the Claimant did not call that witness from Seneca to testify about his opinions, nor did the Claimant offer any written report from Seneca as to the cause of the leak. In the absence of such expert testimony or evidence, the Claimant has not met his burden of establishing that the roofing work was inadequate, unworkmanlike, or incomplete, or that it was even the cause of the leak.

Even if the Claimant had established an act or omission by the Respondent, the Claim would fail as the Claimant did not establish the costs to restore, repair, replace, or complete the work. The Claimant's testimony made clear that the estimate he was using to support his claim included amounts to replace siding on the Residence, which was not within the scope of the Respondent's work. The Claimant did not know what work would be done to repair the roof and he did not have any itemization of the cost to repair the roof versus the cost to replace the siding.

Thus, he did not establish the amount of any "actual loss" by a preponderance of the evidence. *See* COMAR 09.08.03.03B; *Brzowski*, 114 Md. App. at 629.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant failed to meet his burden of establishing that there was an unworkmanlike, inadequate, or incomplete home improvement by the Respondent and that the Claimant failed to meet his burden of establishing that he sustained an actual loss. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

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

Signature on File

August 26, 2015
Date Decision Issued

Emily Daneker
Administrative Law Judge

ED/emh
#157715

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

The Maryland Home Improvement Commission	*	**BEFORE THE MARYLAND HOME IMPROVEMENT COMMISSION**
v. Joseph Ryba t/a Joe Ryba Roofing & Home Improvements (Contractor)	*	**MHIC No.: 14 (90) 708**
and the Claim of Nello Ienzi (Claimant)	*	

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FINAL ORDER

WHEREFORE, this 11th day of February 2016, Panel B of the Maryland Home Improvement Commission ORDERS that:

1. **The Findings of Fact set forth in the Proposed Order dated October 27, 2015 are AFFIRMED.**
2. **The Conclusions of Law set forth in the Proposed Order dated October 27, 2015 are AFFIRMED.**
3. **The Proposed Order dated October 27, 2015 is AFFIRMED.**
4. **This Final Order shall become effective thirty (30) days from this date.**
5. **During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION