

IN THE MATTER OF THE CLAIM
OF DENISE L. HANNA,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF LAURENCE KAYE,
T/A L. KAYE CONSTRUCTION,
RESPONDENT

* BEFORE ANN C. KEHINDE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
*
*
* OAH No.: DLR-HIC-02-16-09162
* MHIC No.: 15 (90) 1170
*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 23, 2015, Denise L. Hanna (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$8,359.00 in alleged actual losses suffered as a result of a home improvement contract with Laurence Kaye, t/a L. Kaye Construction (Respondent).¹

¹ The Claimant initially claimed \$8,359.00 but at the hearing she amended it to \$8,599.00 because the estimate from increased by \$240.00.

I held a hearing on September 9, 2016, at the Bel Air Branch Library, located in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(c) (2015).² The Claimant represented herself. The Respondent represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (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 Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 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 the actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

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

- | | |
|--------|---|
| Cl. #1 | Project proposal/contract, dated November 27, 2013. |
| Cl. #2 | Copies of receipts prepared by Contractor to Claimant. |
| Cl. #3 | Email regarding payments and change orders |
| Cl. #4 | Note from Contractor regarding change order for pavers under deck and grading |
| Cl. #5 | Cancelled check and correspondence from Claimant to Respondent, dated May 8, 2014 |

² Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

- Cl. #6 Emails between Claimant and Respondent, dated March 3, 2014
- Cl. #7 Emails between Claimant and Respondent, dated March 29-30, 2015
- Cl. #8 Email between Claimant and Respondent, dated April 10, 2015 to April 23, 2015
- Cl. #9 Part of the original foam installed near the ridge vent
- Cl. #10 Letter from West Chester Insulation, Inc. to Office of Attorney General, Pennsylvania, dated June 25, 2015
- Cl. # 11 Complaint Form, dated May 28, 2015
- Cl. #12 Letter from Respondent to Claimant, dated May 24, 2015
- Cl. # 13 Proposal and scope of work from Atlantic Environmental Solutions, dated June 4, 2015
- Cl. # 14 Emails between Claimant and Respondent, dated September 28, 2015, October 1-5, 2015
- Cl. # 15 Brothers Services Company estimate
- Cl. #16 George Korb, Co., Inspection, dated September 15, 2015 and September 28, 2015
- Cl. #17 Majors Air Quality Consultants, dated April 27, 2015

I admitted the following exhibits on behalf of the Fund:

- GF #1 Notice of Hearing, dated July 5, 2016
- GF #2 Hearing Order, dated March 14, 2016
- GF #3 Respondent's Licensing Record
- GF # 4 Home Improvement Claim Form, filed November 23, 2015

No exhibits were offered on behalf of the Respondent.

Testimony

The Claimant testified in her own behalf and also presented testimony from George Korb, who testified as an expert in roofing/construction and home inspections; and, Gina Raspa, Majors Air Quality Consultants, who testified as an expert in mold and air flow.

The Fund did not present any witnesses.

The Respondent testified in his own behalf.

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 4690616.
2. On or about November 27, 2013, the Claimant and the Respondent entered into a contract (Contract) for extensive renovations to the Claimant's home in Street, Maryland. The Contract included removing and demolishing the roof rafters and roofing material and replacing same with a more adequate roof pitch to alleviate leak problems. The existing roof material was to be replaced with a standing seam (Standard Red) metal roof. All soffits on the roof were to be vented (white) and vinyl; all gables were to have 12 inch overhangs and fascia was to be premium PVC. Insulation in the attic was to be upgraded to conform to the Harford County Code (R-49).
3. The agreed-upon contract price for the roof, and other work under the Contract, was \$49,800.00.
4. On January 3, 2014, the Respondent began work and the Claimant paid the Respondent \$10,000.00 cash deposit. On February 28, 2014, and March 14, 2014, the Claimant made cash payments of \$10,000.00 on each date to the Respondent. On February 21, 2014,

February 28, 2014, and March 14, 2014, the Claimant made a cash payment of \$6,000.00, on each date, to the Respondent. As of March 14, 2014, the Claimant made payments of \$48,000.00 to the Respondent. The Claimant's remaining balance owed to the Respondent was \$1,800.00.

5. On or about March 27, 2014, Westchester Insulation came to the Claimant's home and sprayed insulation into her attic.

6. On April 15, 2014, the Claimant contacted the Respondent by email to set up a meeting to go over the budget and to discuss a change order for installing pavers under the deck.

7. On April 17, 2014, the Claimant and Respondent met and went over the budget or bill prepared by the Respondent. It included items to (1) build up attic area to accommodate storage, for an additional charge of \$1,200.00, and (2) upgrade deck surface material, for an additional charge of \$360.00. The Claimant told the Respondent she did not believe she should have to pay those charges because the Respondent knew from the beginning of the project that the Claimant wanted a functional attic and the deck surface material was agreed to earlier without the additional charge. The Respondent waived the additional charges.

8. Also during the meeting on April 17, 2014, the parties discussed a change order or add-on. The Claimant would purchase pavers to be installed under the deck. The Respondent agreed to purchase the timbers and sand. The Respondent told the Claimant to keep track of the hours his men worked and the Claimant would then pay for the men's work at the same hourly rate that the Respondent paid them. The Respondent agreed to give the Claimant the receipts for the materials so the Claimant could pay them.

9. The third and last item discussed during the meeting on April 17, 2014, was the snow guards. The Claimant assumed snow guards were part of the roof and did not know they

were an additional cost. The Respondent told the Claimant that if she would purchase the guards and the screws then he would install them for free.

10. The Claimant kept track of the hours the two men worked in installing the pavers. She noted that they worked for three hours on April 17, 2014, and seven hours each on April 18, 23, 24, and 25, 2014 for a total of thirty-one hours. The Claimant figured that the workers should be paid \$25.00 per hour because this was the amount the Respondent noted in a March 3, 2014 email as the labor costs. The labor costs for the two men working thirty-one hours each at \$25.00 per hour totaled \$1, 550.00.

11. The Respondent never told the Claimant to use a different amount for the labor costs or that he used a different rate.

12. On or about April 25, 2014, the Respondent gave the Claimant a "sticky note" stating that the men were owed \$5,125.00.

13. On May 8, 2014, the Claimant sent the Respondent a detailed letter. She informed the Respondent that she still owed \$1,800.00 unpaid from the original contract price. She further stated that there were upgrades that she was paying (\$500.00 for an upgraded roof color, \$493.00 to replace shutters, \$128.00 to remove six sheets of Caltex and \$1,030.00 for a deck landing) for a total of \$2,151.00. In her letter, the Claimant also advised the Respondent that she was paying \$1,550.00 for the hours that the men worked on the paver installation and that, because she never received any receipts, she would give the Respondent \$200.00 towards materials. The Claimant enclosed a check in the amount of \$5,701.00 and stated that she considered the job paid in full.

14. The Respondent cashed the check.

15. On June 23, 2014, the Respondent called the Claimant and told her he wanted the men paid \$50.00 per hour as opposed to \$25.00 per hour. The Claimant told the Respondent that she would not pay that amount because she was never told that it would be a higher rate than \$25.00 per hour. The Respondent became angry with the Claimant and hung up the telephone.

16. Nine months later, on or about March 27, 2015, the Claimant went up to the attic and discovered that it was very damp and that the floor boards were damp and had mold growing on the boards.

17. The Claimant went to the Harford County Building Inspector and was told she should contact the Respondent as well as an industrial hygienist.

18. On April 10, 2015, the Respondent sent a worker to look at the Claimant's attic. He took pictures.

19. On April 13, 2015, the Claimant emailed the Respondent to follow up on his worker taking pictures. She asked him to come in person to see the mold. The Respondent replied on April 13, 2015, in the morning, that he would contact the insulation company and ask them to come out and uncover the soffit that was blown in. The Respondent also stated that if that did not correct the high level of moisture, then additional gable vents, or other form of ventilation, would need to be installed.

20. Later in the day on April 13, 2015, the Claimant emailed the Respondent that she had been in contact with an industrial hygienist who would charge \$299.00 to identify the type of mold, check the ventilation, collect two air samples and write a report. In response, the Respondent sent an email to the Claimant stating that his company was not paid in full for services but would be happy to address the problem if her previous debt to him was satisfied.

21. On April 16, 2015, the Respondent came to the Claimant's home and used a leaf blower to blow open the soffit. The Claimant asked the Respondent to come into the attic to see the mold but he refused. The Respondent gave the Claimant a bill for \$4,854.67 that he said remained unpaid from the work he did for the Claimant.

22. After more emails from the Claimant to the Respondent asking him to explain how he was going to address the mold problem, the Respondent sent the Claimant an email on April 20, 2015, stating that she owed him \$7,604.67 for the work he did.

23. On April 22, 2015, Gina Raspa came to inspect and evaluate the Claimant's attic. Prior to visiting the Claimant's house on April 22, 2015, she told the Claimant over the telephone to continuously run a dehumidifier in the attic to try and decrease the amount of moisture in the attic.

24. The following conditions existed at the time of Ms. Raspa's inspection:

- Apparent mold growth everywhere in the attic, including the sheathing, trusses, ridges and floor boards.
- A lot of insulation had been used. Moisture has difficulty escaping if an attic is over insulated. Everything in the attic was damp to the touch prior to running the dehumidifier.
- Thermoisture reading in the attic was forty-six per cent and within the range of normal (thirty-five to forty-eight percent).
- Air samples in the attic taken by Ms. Raspa revealed the presence of Aspergillus/Penicillium spores which grow at sixty percent humidity. There were 147 spores in the control sample. There were 2,860 spores in the sample taken from the main level of the Claimant's home. There were 69,860 spores in the sample taken from the Claimant's attic.

25. Ms. Raspa recommended that the Claimant hire a professional mold radiation firm to remove and dispose of all exposed insulation and baffles. She further recommended that the air flow problem in the attic be corrected before any insulation is put back into the attic. She also recommended using an air scrubber for the main level and attic, as well as treating all

affected areas with an EPA Registered Fungicide/Biocide, and damp wiping and vacuuming with a HEPA vacuum two times, and cleaning and sanitizing the air ducts, vents and air handler unit.

26. On approximately April 29, 2015, Ms. Raspa returned to the attic to do a "smoke test" to see how the air was moving in the attic. She was unable to do the test the week before due to the number of people who were in the attic. If there was positive air flow in the Claimant's attic, the smoke should have been pulled up in the air by the soffits and then pulled out through the ridge vent. When Ms. Rasap did the test, the smoke stagnated and did not move.

27. On May 6, 2015, Atlantic Environmental Services (Atlantic) proposed to remediate the mold in the Claimant's home as described in finding of fact number 25 for \$5,000.00. On June 4, 2015, the Claimant entered into a contract with Atlantic, and by June 23, 2015, the mold was remediated and the Claimant paid Atlantic in full.

28. On September 14, 2015, George Korb inspected the Claimant's attic.

29. The following conditions existed at the time of Mr. Korb's inspection:

- There was no cross ventilation in the attic area and that when you insulate, you must cross ventilate.
- The soffit vent was covered with insulation. There were no vents at the gable ends of the house and that there was no ridge vent.
- The chimney leaks when it rains because of the lack of proper flashing around the chimney. Very thick foam had been installed to cap off the ends of seams. The foam would prevent any air flow in or out of the attic.

30. On or about November 4, 2015, Brothers Services Company (Brothers) provided the Claimant with an estimate of \$3,359.00 to removing the existing ridge vent and mesh and dispose of it, cut the metal along both sides of the ridge back to allow for 1 and ½ inch of opening on either side of the center of ridge; install flashing on both front and rear of the ridge. The estimate was good for thirty days.

31. On September 8, 2016, the Claimant asked Brothers for an updated estimate. Brothers estimated that the same work contained in finding of fact number 30, could be provide for \$3,799.00.

DISCUSSION

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There is no *prima facie* impediment to the Claimant’s recovery from the Fund (being related to or employed by the Respondent; recovering damages from the Respondent in court or through insurance stemming from the same facts that are the basis of her claim; not occupying the property that is the subject of the contract; or owning more than three houses). Bus. Reg. §§ 8-405(f) and 8-408(b)(1).

The Claimant argued that the Respondent built her roof which resulted in an attic with inadequate airflow. She further argued that he did not install the proper ridge vent for the type of roof she had. She argued that she should be made whole by having the Respondent reimburse her for what she had to pay to Brothers and Atlantic.

The Respondent argued that the attic was built to Code and that he used the proper ridge vent. The Respondent also argued that he was very involved with the job and that he only changed the soffit because the Claimant asked him to do so.

On behalf of the Fund, counsel argued that it was more likely than not that the contract between the Respondent and Claimant was paid in full by the Claimant. Further, he argued that the Claimant is entitled to an award of \$3,799.00 (estimate from Brothers) but not the amount she spent for remediation of the mold because that was consequential damages.

After carefully reviewing all of the documentary evidence and testimony, I conclude that the Claimant paid the contract (and change orders) in full. First, the Claimant was extremely organized and made detailed notes at the time of the event. Therefore, I give greater weight to her testimony because it was corroborated by documents she created at the time and gave to the Respondent. Second, if the Respondent did not agree that the Claimant had paid her bill in full, why did he cash the check on or about May 9, 2014, but wait more than a month, to June 23, 2014, to call the Claimant and tell her she did not pay the men at their correct hourly wage? Moreover, if the Respondent also believed that there were other parts of the bill that were not paid, why did he fail to raise those items in June 2014, when he asserted the men were not paid enough? The Claimant did not pay the Respondent anything further, and he took no action until she contacted him in March 2015, nine months later, to inform him that there was mold in her attic.

When the Claimant contacted the Respondent in March 2015, he did not raise the allegation that he was not paid in full. Instead, it was not until April 2015, when the Claimant advised the Respondent that she was incurring costs to pay for the industrial hygienist, that the Respondent presented the Claimant with a bill for \$4,854.67 that he said remained unpaid from the work he did for the Claimant. After more emails from the Claimant to the Respondent asking him to explain how he was going to address the mold problem, the Respondent sent the Claimant an email on April 20, 2015, stating that she owed him \$7,604.67 for the work he did. The almost

three thousand dollar increase in the Respondent's request that was made a week or two later, in addition to the fact that the Respondent did not make this request until he was told by the Claimant that she wanted to know how he was going to address the mold, leads me to conclude that the Respondent's assertion that the Claimant did not pay him in full is completely lacking any credibility.

I also conclude that the work the Respondent did on the Claimant's attic was unworkmanlike. Although the Respondent claimed everything he did was correct according to the Harford County Building Code, he did not present any evidence to corroborate his position. Mr. Korb has extensive roofing experience as well as extensive experience in inspecting roofs. Mr. Korb testified that the Respondent did not adequately provide for ventilation in the attic or proper flashing around the chimney. The Claimant presented an estimate from Brothers to fix these areas. Although the estimate was higher than what Mr. Korb recommended, I also note that Mr. Korb did not raise his estimate of what it would cost to provide proper flashing for the chimney, from his estimate of what it would cost to correct the attic ventilation problem only. 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). In this case, the Claimant argued that if it were not for the Respondent's unworkmanlike performance in inadequately ventilating the attic, she would not have had mold and would not have had to pay to have the mold remediated.

Consequential damages are not defined in the statute, but are typically considered to be "such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only results from some of the consequences or results of the act." *Black's Law Dictionary* (8th ed. 2004). In this case, although the Respondent's unworkmanlike performance was failing to

install a proper ridge vent, it was that factor which then led to decreased air movement, along with possibly too much insulation, which then resulted in higher than normal moisture levels and, eventually, the growth of mold in the Claimant's attic. I cannot conclude that the growth of mold in the Claimant's attic was due to the direct and immediate failure of the Respondent to install the proper ridge vent.

MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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, I have concluded that the original contract between the Respondent and Claimant (plus any change orders) was paid in full. The Brothers estimate demonstrated that the Claimant will be required to pay Brothers \$3,799.00 in order to repair poor work done by the original contractor under the original contract.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant's claim be granted in part and denied in part. She has sustained a compensable loss as a result of the Respondent's acts and omissions in the amount of \$3,799.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

I further conclude that the remaining balance of the Claimant's request (\$8,599.00 - \$3,799.00 = \$4,800.00) be denied as consequential damages. COMAR 09.08.03.03B(1).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund grant the Claimant's claim as to \$3,799.00 but dismiss the remaining \$4,800.00 of the Claimant's claim as consequential damages; and

ORDER that the Respondent shall not be eligible for a Home Improvement Contractor's license until he repays the Maryland Home Improvement Commission the amount of the award, plus interest; and

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

Signature on File

December 6, 2016
Date Decision Issued

Ann C. Kehinde
Administrative Law Judge

ACK/ej
#165626

PROPOSED ORDER

WHEREFORE, this 27th day of January, 2017, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION