

IN THE MATTER OF THE CLAIM	* BEFORE LAURIE BENNETT,
OF COURTNEY HOLSTEIN,	* AN ADMINISTRATIVE LAW JUDGE
now COURTNEY BLUSIEWICZ,	* OF THE MARYLAND OFFICE
CLAIMANT	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	* OAH No.: DLR-HIC-02-15-42716
IMPROVEMENT GUARANTY FUND	* MHIC No.: 15 (90) 1284
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF,	*
BERTRAM LEBHAR t/a ATLANTIC	*
REMODELING CORP.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On October 6, 2015, Courtney Holstein, now Courtney Blusiewicz, filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,500.00 in alleged actual losses suffered as a result of a home improvement contract with Bertram Lebhar, t/a Atlantic Remodeling Corporation (Respondent).

I held a hearing on June 8, 2016, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent did not appear after proper notice.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02.01B; 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise noted, I admitted the following exhibits on the Claimant's behalf:

1. Timeline of Events, undated
2. Contract with the Respondent, November 26, 2014
3. Cancelled check, December 18, 2014
4. (A-B) Photographs
5. Emails between the Claimant and Jim Yates, April 8, 2015
6. Emails between the Claimant and Jim Yates, starting April 10, 2015
7. Emails between the Claimant and Jim Yates, starting April 13, 2015

8. Emails between the Claimant and Jim Yates, starting April 20, 2015
9. Emails between the Claimant and Jim Yates, starting April 23, 2015
10. Email from Jim Yates to the Claimant, April 27, 2015
11. (A-E) Photographs
12. CertainTeed Shingle Applicator's Manual, Chapter 10, p. 93
13. CertainTeed Shingle Applicator's Manual, Chapter 10, p. 92
14. NOT ADMITTED Internet article on asphalt shingle roof installation procedures from
InspectAPedia
15. (A-B) Photographs
16. CertainTeed Shingle Applicator's Manual, Chapter 7, page number not visible;
photograph
17. (A-F) Photographs
18. Email from William Banks to the Claimant, July 28, 2015
19. Invoice, Five Star Electric, Inc., December 14, 2015; (A-B) photographs
20. NOT ADMITTED Internet article from Angie's List on home electrical wiring
21. NOT ADMITTED Internet article on wiring color code from "do it yourself"
22. Email from John Riordan to the Claimant's husband, May 30, 2015
23. Email from William Banks to the Claimant, September 30, 2015
24. Email from the Claimant to Mr. Broccoli, October 5, 2015
25. Email from the Claimant to Mr. Broccoli, November 4, 2015
26. NOT ADMITTED Selective Insurance Company of America check, March 1, 2016
27. Estimate, Brothers Services Company, undated
28. Estimate, DryTech, undated

I admitted the following exhibits that the Fund offered:

1. Notice of Hearing, April 21, 2016; United States Postal Service certified mail green card
2. Memorandum from Sandra Sykes to Legal Services, May 19, 2016, with returned first class mail to the Respondent attached
3. The Respondent's licensing history
4. Hearing Order, December 4, 2015
5. Home Improvement Claim Form, September 30, 2015
6. Letter from MHIC to the Respondent, October 8, 2015

Testimony

The Claimant was the only witness to testify.

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 66422.
2. The Claimant is not the Respondent's spouse or other immediate relative; the Respondent's employee, officer, or partner; or an immediate relative of the Respondent's employee, officer, or partner.
3. On November 26, 2014, the Claimant met with the Respondent's agent, Jeremy Hawkins, to discuss replacing the roof at the Claimant's residence. The roof was not leaking, but it was at the end of its natural life, and the Claimant wanted to replace it.
4. Mr. Hawkins gave the Claimant a sales presentation during which he stated that the Respondent would place six nails in every shingle instead of what Mr. Hawkins claimed was

the industry standard of two nails. On that same day, the Claimant and the Respondent¹ entered into a contract in which the Respondent would:

- Tear off existing two layers of shingles;
- Install CertainTeed Diamond Deck Underlayment;
- Install F4.5 Dripedge on complete perimeter of the roof;
- Install CertainTeed WinterGuard on all gutterlines, valleys, and protrusions;
- Install CertainTeed Landmark Shingles;
- Install Shingled Ridge Vent;
- Reflash all necessary areas; and
- Remove all job debris.

5. The Respondent gave the Claimant a twenty-five-year manufacturer's warranty and a ten-year labor warranty.

6. The Claimant instructed the Respondent that if he found rotten wood after he removed the existing roof, he should advise her, and she would pay him for the cost of replacing the wood.

7. The original agreed-upon contract price was \$7,500.00.

8. On the contract date, the Claimant made a down payment of \$2,475.00 by personal check. The \$5,025.00 balance was due upon completion of the work.

9. On December 18, 2014, the Respondent started and completed work.

10. The Respondent did not notify the Claimant that there was any visibly rotten wood when he removed the existing two layers of shingles before installing the new roof.

11. On December 18, 2014, the Claimant paid the balance due by personal check.

¹ Through this decision, "Respondent" means Mr. Lebhar or his agents or employees.

12. To prevent cracking, shingles must be sufficiently warm to allow proper forming for hips, ridges, and valleys.²

13. When nailing CertainTeed Landmark Shingles, a contractor shall drive the nails straight, not angled, into each shingle, and the nails should be flush with the top of the shingle, not driven below the top of the shingle. The Respondent drove nails below the top of some of the shingles, and at least one nail was so close to the edge of the shingle that it could not secure the shingle. Two shingles had a gap between them sufficient to allow water to penetrate underneath the shingles.

14. On February 15, 2015, seven shingles fell off the roof during strong winds. The shingles had no more than three nail holes and some had fewer, and the adhesive strips still were still covered by the cellophane tape.

15. On February 15, 2015, the Claimant called the Respondent and talked to someone named Shane in the installation department, who said it did not matter how many nails were used because the weather was too cold for the shingle installation. Snow was on the roof, and Shane promised to replace the shingles in warmer weather. The Claimant told Shane that the Respondent could make the repair at any time and to leave a message that the repair had been made. No one ever called the Claimant to report that the repair had been made.

16. One week later, the Claimant noticed water spots on the ceiling in an upstairs closet. The Claimant called the Respondent; she spoke to someone who told her the shingles were not to blame for the water spots because, unbeknownst to the Claimant, the roof had been repaired since the Claimant's last call. Nevertheless, the Respondent inspected the roof and

² The record does not define "sufficiently warm."

determined that the flashing was improperly installed. Improper flashing would allow water to penetrate the roof.

17. The leak persisted the following week. The Claimant called the Respondent, whose worker inspected the roof and took down several loose shingles and some rotten wood from the side of the chimney. The worker told the Claimant that he fixed the leak with a covering but did not fix the rotten wood.

18. The Claimant called the Respondent, who said the leak was the result of the rotten wood under the siding, not the roof. The Claimant was referred to the Respondent's operations manager, Jim Yates, who said someone would perform an inspection.

19. The Respondent scheduled an inspection for April 6, 2015, but no one showed up or called to reschedule.

20. The Respondent rescheduled the inspection for April 8, 2015. The Respondent's inspector, a man named Chino, went to the Claimant's home. The Claimant asked Chino to inspect the attic, which Chino said he would do when he returned another day to fix the leak, re-install the fan, and replace the rotten wood.

21. On or about April 8, 2015, the Claimant's husband inspected the attic. The fan that was in the attic and that was operational before the Respondent installed the roof was now missing. The Respondent removed the fan during the roofing work and capped off the wires. The Claimant called the Respondent and spoke to Mr. Yates, who said that was normal. The Claimant asked the Respondent to replace the fan, which the Respondent did at his expense. The Respondent did not tell the Claimant that he removed the fan because a fan is a vent system, it was redundant to the vent ridge system that he installed, and it is improper to have redundant vent systems.

22. On April 8, 2015, after the inspection, the Claimant's husband emailed Mr. Yates to express his and his wife's frustration and to request, among other items, an attic inspection; roof leak repairs, if the leak originated from the roof; inside repairs, if the leak originated from the roof; re-installation of the attic fan; and re-attachment of electrical wires leading to the attic fan.

23. On April 8, 2015, Mr. Yates responded to the email. He stated that he would resolve the Claimant's issues. Mr. Yates told the Claimant that the reason Chino did not inspect the attic was because the Claimant was upstairs and he could therefore not get to the attic. The Claimant, however, was in a different part of the house and was not an impediment to inspecting the attic. Mr. Yates promised to get back to the Claimant the next day with possible dates to do the repairs. Mr. Yates did not get back to the Claimant as promised.

24. On April 10, 2015, the Claimant's husband emailed Mr. Yates to ask for possible dates to make the repairs.

25. On April 10, 2015, the Respondent promised to inspect the attic and to make necessary repairs the following Tuesday. The Claimant's husband and Mr. Yates exchanged additional emails about the date for the work and eventually agreed on Tuesday, April 14, 2015, despite the forecast for rain.

26. Mr. Yates subsequently proposed changing the date to April 20, 2015, because he had double booked his technicians for Tuesday. Mr. Yates and the Claimant's husband exchanged emails and settled on April 21, 2015.

27. On April 20, 2015, the Claimant's husband emailed Mr. Yates to confirm the appointment for the next day.

28. The appointment occurred as scheduled. Mr. Yates and Chino were present. Mr. Yates or Chino re-installed the fan but did not perform other repairs. Mr. Yates told the Claimant that Chino was not an electrician and could not do the wire work for the fan and he would send a qualified electrician another day.³ After Mr. Yates left the property, Chino performed the electrical work.

29. On April 23, 2015, the Claimant wrote to Mr. Yates to say that the fan was now running constantly and to complain that Mr. Chino incorrectly connected the fan wires after Mr. Yates left.

30. On April 27, 2015, Mr. Yates emailed the Claimant and promised to perform the repairs at the Claimant's convenience. The Claimant did not respond because she lacked confidence in the Respondent's ability and commitment to make the repairs.

31. By letter dated August 24, 2015, the Respondent, through his Director of Operations, Dino Broccoli, advised the Claimant that Mr. Yates was no longer employed by him, she was not the only homeowner he needed to "square things up with," and the Respondent discovered that Mr. Yates "had been 'burying' issues like [hers] for quite some time." Mr. Broccoli offered to meet with the Claimant and an independent third party from CertainTeed to examine the roof and make necessary repairs. Clmt. Ex. 23. The Claimant, having received no satisfaction from the Respondent to that point, elected not to accept Mr. Broccoli's offer of help.

32. The Claimant's actual loss due to the Respondent's unworkmanlike home improvement is \$5,940.00.

33. The MHIC suspended the Respondent's license on May 24, 2015.

³ I infer from the Claimant's testimony that installing the fan means setting it in place, not attaching the wires, which is a separate procedure.

DISCUSSION

The first issue is whether the Respondent, who did not appear for the hearing, was issued proper notice of the hearing. “If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.” Md. Code Ann., Bus. Reg. § 8-312(h) (2015). MHIC’s regulations further state that the hearing may proceed in a respondent’s absence if the respondent has been served and he has not obtained a postponement. COMAR 09.01.02.09.

On April 21, 2016, the OAH issued notice to the Respondent at his address of record via first class and certified mail. The Respondent or someone on his behalf signed for the certified mail. Fund Ex. 1. The United States Postal Service returned the first class mail marked “Return to Sender No Such Number Unable to Forward.” I find that the OAH issued proper notice. The Respondent did not request a postponement. I proceeded in the Respondent’s absence.

Turning to the merits of case, 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) (2015); *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 Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125 n.16

(2002) (quoting Maryland Pattern Jury Instructions 1:7 (3d ed. 2000)). For the following reasons, I find that the Claimant has proven eligibility for compensation.

Although the Department suspended the Respondent's home improvement license on May 24, 2015, he was licensed when he contracted with the Claimant. While holding a license, the Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

The Claimant argued that the Respondent performed unworkmanlike, inadequate, or incomplete home improvement on the basis that the roof leaked after he installed it, he used an inadequate number of nails on each shingle, he left the cellophane strip intact on the shingles, he improperly installed flashing, he did not replace rotten wood, and it was not warm enough to properly install the shingles. Because the Respondent did not appear for the hearing, I infer that he does not dispute the Claimant's assertions. Nevertheless, because the Claimant bears the burden of proof, I will evaluate each claim.

As to the nails, CertainTeed's applicator's manual shows that nails must be driven straight into the shingle and shall be flush with the shingle; nails should not be driven below the top of the shingle nor sit above the top of the shingles. The Claimant presented photographs to show that a sampling of shingles were not properly nailed. Nails were below the top of the shingle. In one instance, the nail was so close to the edge of the tile that it did not secure it. The record does not show how many nails were driven improperly; I would not expect the Claimant to check every shingle. Absent evidence to the contrary, I find that the sample is, more likely than not, representative of the Respondent's workmanship. The Respondent did not properly nail the shingles.

As to the number of nails, the Claimant testified that the Respondent promised to use more nails than the industry standard of two per shingle.⁴ The contract is silent as to the number of nails. The Claimant testified that when shingles blew off the roof, she noticed three or fewer nails in each tile. At a minimum, the Respondent was required to meet the industry standard. The Claimant did not present any photographs of shingles with an inadequate number of nails. If the industry standard is two nails, as the Claimant testified the Respondent told her, the evidence does not show that he used fewer than two per shingle. The Claimant did not meet her burden on this issue.

As to the cellophane tape, the Claimant implied that because the Respondent had not removed it before installing the shingles, the adhesive strips are useless. The record, however, does not show that the industry standard calls for removing the cellophane. I find that the Claimant has not met her burden on this issue.

As to the roof flashing, the Respondent told her that it was not properly installed. I find that the Claimant has met her burden on this issue.

As to the rotten wood, the Claimant advised the Respondent to notify her whether he observed any rotten wood when he removed the two old layers of roofing material. The Respondent did not give such notice to the Claimant. It is possible that he did not observe any rotten wood. Weeks later, however, the rotten wood was evident. The Respondent told the Claimant the rotten wood caused the leak. It is possible, however, that the wood rotted because the Respondent improperly installed flashing and shingles, which allowed rain water to penetrate the roof. Whether the wood was rotten at the time of the original roof work or it was rotten as a result of the roof work, I conclude that the Respondent performed unworkmanlike, incomplete,

⁴ The only evidence of the industry standard is the Claimant's testimony about what the Respondent told her. The Respondent did not dispute the testimony.

or inadequate home improvements on the basis that he did not replace the wood. The Claimant has met her burden of proof on this issue.

As to the temperature, CertainTeed's applicator's manual states that "[t]o prevent cracking, shingles must be sufficiently warm to allow proper forming for hips, ridges and valleys." Clmt. Ex. 13. The Claimant presented a photograph of a cracked shingle, and she testified that the Respondent's employee, a man named Shane, told her that it was not warm enough to install the shingles. I find that the Claimant has met her burden of proof on this issue.

As to the fan, the Claimant testified that she asked the Respondent to reinstall it after her husband inspected the attic and noticed the fan was missing and the wires were capped. The Respondent reinstalled the fan. He should have, but did not, advise the Claimant that he removed it because a roof should not have two vent systems and because he installed a vent ridge system, the attic fan was unnecessary. The Claimant has met her burden of proof on this issue.

As to the fan wires, the Claimant asserts that Chino improperly configured them. She testified that Mr. Yates told her on the day the fan was reinstalled that Chino did not have the skill to re-do the wires, but after Mr. Yates left the job site, Chino did the electrical work anyway. The Claimant presented a statement from Five Star Electric, Inc., stating that the wiring was wrong. The person who wrote the statement did not offer more specific information. I, thus, cannot find that the Claimant met her burden of proof on this issue.

The most compelling evidence that the Respondent did unworkmanlike, inadequate, or incomplete home improvement is that the roof did not leak before the Respondent worked on it, and it did leak after. The Respondent did not identify any cause of the leak, other than his work. For this and all of the reasons stated above, I find that the Claimant has met her burden of proof.

The MHIC may deny a claim if it finds that the “claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann., Bus. Reg. § 8-405(d). The Respondent offered to make repairs. The Claimant initially accepted his offer. The Respondent never made the repairs and the Claimant eventually lost confidence in him. Her lack of confidence was reasonable for two reasons. First, the Respondent’s employees offered different opinions about the problem (e.g. the flashing was not properly installed, the wood was rotten). Second, the Respondent did not in fact make repairs even after promising to do so. The Claimant’s decision to reject the Respondent’s offer was reasonable.

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). Of the three, the following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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).

The Claimant obtained two estimates for repairing the roof. One estimate is from DryTECH for \$5,820.00. The second estimate is from Brothers Services Company (Brothers) for a low of \$5,940.00 to a high of \$10,441.00, depending on the grade of shingle; the Claimant

testified, and I agree, that the lower quote is more in keeping with the contract she had with the Respondent. The Claimant asserts, and the Fund agrees, and I find, that the lowest Brothers estimate is more appropriate than the slightly lower DryTECH estimate because it is more detailed in the scope of work. The Claimant expects to hire Brothers. Based on the Brothers' estimate, and in accordance with COMAR 09.08.03.03B(3)(c), the Claimant's loss is calculated as follows:

Amount paid to Respondent under original contract	\$7,500.00
+ Reasonable amount to repair	<u>\$5,940.00</u>
TOTAL	\$13,440.00
- Less the original contract price	<u>\$7,500.00</u>
TOTAL/ACTUAL LOSS	\$5,940.00

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$5,940.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,940.00; 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 (10%) as set by the Maryland Home Improvement Commission;⁵ and

ORDER that the Maryland Home Improvement Guaranty Fund grant the Claimant's claim; and

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

Signature on File

July 19, 2016
Date Decision Issued

Laurie Bennett
Administrative Law Judge

LB/sm
#162836

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

PROPOSED ORDER

WHEREFORE, this 19th day of August, 2016, 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