

IN THE MATTER OF THE CLAIM * BEFORE JOY L. PHILLIPS,
OF LUIS H. AND JENNY REYES * AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS, * OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME * OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND * OAH NO.: DLR-HIC-02-12-27572
FOR THE ALLEGED ACTS OR * MHIC NO.: 10 (90) 268
OMISSIONS OF JOHN CAPELLO, t/a * *
CAPELLO CONSTRUCTION, INC., * *
RESPONDENT * *

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
 ISSUE
 SUMMARY OF THE EVIDENCE
 FINDINGS OF FACT
 DISCUSSION
 CONCLUSIONS OF LAW
 RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 18, 2011, Luis H. and Jenny Reyes (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,425.00 for actual losses allegedly suffered as a result of a home improvement contract with John Capello, trading as Capello Construction, Inc. (Respondent).¹

I convened a hearing on June 19, 2013 at the Department of Agriculture, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Chris King,

¹ John Capello's cousin, Stephen Capello, was also involved in the construction and the negotiations, but only John is named in the Claim and Stephen's position in Capello Construction was not clarified at the hearing.

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent represented himself.²

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 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimants 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 Fund's behalf:

- Fund Ex. 1 Notice of Hearing and unclaimed mail with Memo, dated March 20, 2013
- Fund Ex. 2 Affidavit of Thomas Marr, IV, dated September 26, 2012
- Fund Ex. 3 Hearing Order, dated June 13, 2012
- Fund Ex. 4 Licensing Information, dated June 18, 2013
- Fund Ex. 5 Home Improvement Claim Form, dated July 18, 2011
- Fund Ex. 6 Letter to the Respondent from William Banks, Jr., Investigator, MHIC, dated July 22, 2011

I admitted the following exhibits on the Claimants' behalf:

- Claimant Ex. 1 Contract, dated April 22, 2008
- Claimant Ex. 2 Copies of checks to the Respondent
- Claimant Ex. 3 Letter and Invoice from Carter Mechanical, Inc., dated September 1, 2009
- Claimant Ex. 4 Emails between the parties, ranging from November 2008 to June 2009

² The hearing was scheduled to convene at 10:00 a.m., but the Respondent did not appear on time. I waited fifteen minutes to begin the hearing. At approximately 10:18 a.m., the Office of Administrative Hearings (OAH) Clerk's Office called to inform me that the Respondent had gone to the DLLR office in Baltimore and had been redirected to the location of the hearing in Annapolis. The hearing proceeded in his absence. The Respondent arrived at 11:20 a.m. and participated in the remainder of the hearing.

- Claimant Ex. 5 Correspondence between the parties and the Better Business Bureau, ranging from July 2009 to January 2010
- Claimant Ex. 6 Letter from MHIC to the Respondent, dated October 14, 2009, with copy of complaint form (undated)
- Claimant Ex. 7 Photos
- Claimant Ex. 8 Letters between Herbert Berkow, Mediator, Office of the Attorney General Consumer Protection Division, and the parties, ranging from June 9, 2010 to March 10, 2011
- Claimant Ex. 9 Letters between the Claimants and William Banks, Jr., Investigator, MHIC, dated April 19, 2011 and July 18, 2011, with claim form and photos
- Claimant Ex. 10 Estimate from CGC Builders, LLC, dated May 30, 2011
- Claimant Ex. 11 Piece of Foam

The Respondent submitted no exhibits to be admitted into evidence.

The Fund submitted no exhibits to be admitted into evidence.

Testimony

Both Claimants testified on their own behalf and presented no additional testimony.

The Respondent testified on his own behalf and presented no additional testimony.

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 number # 96410.³
2. On April 22, 2008, the Claimants entered into a contract (Contract) with the Respondent authorizing the Respondent to build a two-story addition (Addition) to their home (Residence). The top floor of the Addition was to be a sun room and the bottom floor a finished basement. The dimensions of the footprint of the Addition was to have been 10' by 18'.
3. The original Contract amount was \$49,500.00.

³ The license expired on December 31, 2009.

4. On June 16, 2008, the parties agreed to a change order involving floor finishes, which increased the Contract amount by \$500.00, and to a second change order involving a change in the size of the footprint, to 11' by 18', which increased the Contract amount by \$2,325.00.
5. The Contract price is \$50,000.00.⁴
6. The parties agreed to a slab-on-grade construction with siding down to the ground. The exterior of the Addition was to match the exterior of the Residence.
7. Work began on the Addition in June 2008 and finished in May 2009. The area for the foundation was excavated, cinder blocks were installed around the perimeter and cement was poured, creating a footprint for the Addition. The Claimants soon discovered that the footprint for the foundation was smaller than planned. After complaining to the Respondent, the Respondent removed the cinder blocks and changed the footprint of the foundation. Ultimately, the foundation's dimensions were 10'7" by 16', not 11' by 18'.
8. County inspectors required that a row of cinder blocks (7" by 12") be added to the exterior and interior perimeter of the foundation of the Addition. This requirement added 7" width around the bottom of the walls inside and outside of the basement room and a 12" high cinder block "step" created inside and outside of the basement walls.
9. The Respondent did not install flashing over the exterior cinder block step. Proper flashing would have rerouted rain water away from the Residence.
10. The Claimants paid the Respondent a total of \$47,960.00 for the work.

⁴ At the hearing, the parties acknowledged that numerous changes to the Contract price were made and numerous credits were made as a result of repair work done by the Respondent to address certain problems. They agreed to use the contract amount of \$50,000.00 for purposes of this hearing.

11. As part of the renovation, carpet was installed on the basement floor. In the fall of 2008, the Claimants noticed water seeping into the basement and found mold growing under the carpet. The Claimants notified the Respondent of the water seepage.
12. The Respondent sent a worker to the Residence to spray a polyurethane foam product (Foam), used in commercial construction as an insulator, around the exterior perimeter of the Addition to fill in the 90 degree angle left by the added row of cinder blocks at the base of the walls. After application, the Foam expands and hardens. The Respondent hoped that the Foam would address the water seepage problem.
13. The Foam was unsightly and did not conform to the Contract. There was no written agreement calling for use of the Foam.
14. Within months, the Foam began to shrink, crack and pull away from the walls. Water continued to leak into the basement.
15. In response to the continued water seepage, the Respondent added caulk around the top of the Foam. The caulk abated the water leak.
16. The Claimants continued to complain to the Respondent about the crumbling, unsightly Foam, but the Respondent stopped returning their calls and emails.
17. Over time, the Foam has continued to deteriorate, causing it to crumble off of the Residence in patches. As a result, cement and wood underneath the Foam is exposed.
18. It will cost approximately \$19,425.00 to have a contractor build over the existing foundation with stone and regrade the exterior of the Residence in order to hide the exterior cinder block step.

DISCUSSION

A homeowner 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. 2012). *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).

Most of the facts in this case are not in dispute. Problems with the Respondent’s work began when the excavator excavated the wrong sized footprint for the Addition. Blocks were laid and cement was poured before the parties realized the error. An attempt to change the footprint to conform to the Contract was made, but the resulting footprint was still incorrect. When an inspector looked at the foundation, he required the addition of a cinder block wall around the exterior and the interior of the foundation’s walls. This created a cinder block step around the foundation with a 90-degree angle. Unfortunately, the Respondent decided not to install flashing over the step. Proper flashing would have redirected rain water away from the foundation. Instead, water leaked into the basement, resulting in mold.⁵

How the Respondent addressed the water leakage problem is the heart of the Claim in this case. He sent a worker to the Residence to apply a spray polyurethane foam product to the step created by the addition of the cinder blocks. The Foam puffs up and hardens after it is applied. The Respondent believed that by spraying the Foam on the cinder block step, the water would run off and away from the Residence. But the Foam began to shrink and crack and pull away from the Residence, causing water leakage into the basement. The Respondent’s next

⁵ The Claimants testified that the mold problem was alleviated and was thus not included in the Claim.

solution was to apply caulk around the Foam. While this apparently stopped the water leakage, the Foam continued to crack and break off of the house underneath the caulk. Additionally, it is unsightly and does not match the exterior of the Residence.

The Respondent conceded that the Foam's accepted use is as insulation in the attics of commercial buildings. He thought the Foam would coordinate with the concrete on the existing walls of the Residence. According to the Claimants' testimony, the person who applied the Foam told them he had never seen the product used in the way the Respondent directed him to use it. The Respondent testified that Mr. Reyes agreed to the installation of the Foam and I would note that this testimony was not rebutted by the Claimants. The Respondent is the professional, however, and is charged with providing workmanlike home improvement under the Contract. The Claimants cannot be held responsible for construction decisions that result in something as serious as water leakage into a basement room. Furthermore, the Contract provided by the Respondent to the Claimants requires that any changes be made in writing, which was not done.

In general, the Respondent placed the blame for the construction errors with everyone but himself and his company. He said that the excavator was at fault for misreading the plans and using the interior measurements rather than the exterior measurements. He argued that the inspector who required them to add the cinder block step around the interior and exterior of the foundation misinterpreted applicable regulations, but he provided no specifics in support of that argument and in any event, the argument has no relevance to this case. As the contractor at the site, the Respondent was responsible for making sure the footprint of the house was the correct size and that the foundation complied with all existing regulations. He argued that installing aluminum flashing could have been done, but failed to explain clearly why he did not have it

done. He argued that the Foam constituted “flashing” and the UV protective coating painted onto the Foam should have prevented it from cracking and shrinking. He said that the Homeowners Association had not filed a complaint against the Claimants, implying that the Claimants were not justified in complaining about the unsightliness of the Foam. This argument is without merit, however, as it is not the Homeowners Association who determines whether the Respondent provided the Claimants with workmanlike work.

The Respondent also noted that the Claimants had paid the Respondent in full and “signed off” on the Contract in May 2009. He argued that by doing so, they were admitting that they were satisfied with the work. This argument is without merit. Simply being paid in full does not absolve one from responsibility for unworkmanlike work that was performed pursuant to a contract.

The Claimants argued that the Respondent’s use of Foam and his failure to lay a proper foundation constituted unworkmanlike home improvement for which he is responsible. The Fund concurred, as do I, for all of the reasons stated above.

The Claimants testified to other problems with the work performed by the Respondent, but none of those problems is relevant to the Claim, which focuses on the problem created by the cinder block step at the foundation and the Respondent’s use of the Foam. Thus, I will not address or discuss the other problems raised in the exhibits or in testimony.⁶

To address the problems caused by the cinder block step foundation and the Foam, the Claimants obtained two estimates from CGC Builders, LLC, in May 2011. The first estimate

⁶ The other issues raised by the Claimants in some of the materials submitted into evidence were: 1) Faulty installation of HVAC vents. The Respondent ultimately paid for a licensed HVAC contractor to correct the work his company had done and so this issue was not made a part of the Claim. 2) Unlevel basement floor. The Claimants indicated that the Respondent repaired the basement floor. 3) Grading and topsoil problems. The Claimants mentioned grading problems briefly, but exterior grading is not included in the original Scope of Work and at the hearing, the Claimants testified that the Claim was about the foundation and Foam only.

called for demolishing and rebuilding the existing foundation of the Addition and finishing the Addition. This proposal would repair the interior cinder block step as well as the exterior issues. The cost of that estimate was \$29,800.00 plus \$7,800.00 for planning the project, obtaining permits and engineering the project, for a total cost of \$37,600.00. A second estimate was for a more modest project. In this second proposal, CGC Builders, LLC, would build over the existing foundation with stone and regrade the exterior of the Residence in order to hide the exterior cinder block step. The estimate for the second proposal was \$19,425.00.

The Claimants plan to accept the more modest proposal, although they expressed concern that removing the Foam and covering up the exterior cinder block step could result in continued water seepage. Still, the Claimants decided they did not want to proceed with the complicated proposal involving removal and replacement of the foundation. The estimates appear reasonable in light of the work that needs to be done.⁷

There was testimony regarding the payments made to the Respondent by the Claimants. The parties could not come to an agreement regarding exactly how much the Claimants should have paid to the Respondent or why there were certain credits given against the Contract price. However, the Respondent did agree that he had been paid in full by May 2009. The Respondent and the Claimants agreed that for purposes of this hearing, the working Contract price is \$50,000.00, despite some changes the parties made to that price during the course of construction. I calculated that the Claimants paid the Respondent a total of \$47,960.00.

The Fund argued that the Respondent provided substandard work on the Claimants' Residence, used an inadequate substitute for flashing on the cinder block step and failed to have

⁷ The Respondent argued briefly that he could repair the problem areas for far less cost than CGC Builders were estimating. He was given ample opportunity to repair the problem areas and has chosen not to. His argument that flashing could be supplied for low cost carries little weight, as he was the one who failed to install proper flashing in the first place, choosing instead to use the Foam.

any written agreement to use the Foam. The Fund also agreed that the estimate provided by the Claimants for repairing the work done by the Respondent was reasonable. It agreed that an award under COMAR 09.08.03.03B(3)(c) was appropriate.

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:

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).

Using the applicable COMAR formula, I calculate the Claimants suffered an actual loss of \$17,385.00, as follows:

Amount paid to the Respondent:	\$47,960.00
<i>Plus</i> amount payable to repair and complete:	<u>\$19,425.00</u>
Total:	\$67,385.00
<i>Minus</i> contract price	<u>\$50,000.00</u>
Actual Loss:	\$17,385.00

Accordingly, I recommend an award be made to Claimants in the amount of \$17,385.00.

CONCLUSIONS OF LAW

I conclude that the Claimants sustained an actual and compensable loss of \$17,385.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$17,385.00; 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

September 16, 2013
Date Decision Mailed

Joy U. Phillips
Administrative Law Judge

JLP/kkc
145014

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OF LUIS H. AND JENNY REYES	* AN ADMINISTRATIVE LAW JUDGE
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FILE EXHIBIT LIST

Exhibits

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The Respondent submitted no exhibits to be admitted into evidence.

The Fund submitted no exhibits to be admitted into evidence.

PROPOSED ORDER

WHEREFORE, this 23rd day of October 2013, 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.

Joseph Tunney

*Joseph Tunney, Chairman
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION