

IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
SARAH HOLLEY * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 18(90)738
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
PATRICIA DUNLAP AND DUNLAP & * 02-20-28397
SONS ROOFING, INC. *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on February 22, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on May 14, 2021, concluding that the homeowner, Sarah Holley (“Claimant”) failed to prove she suffered an actual loss as a result of the acts or omissions of Patricia Dunlap and Dunlap & Sons Roofing (collectively, “Contractor”). In a Proposed Order dated June 28, 2021, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On October 21, 2021, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Hope Sachs appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Claimant’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits admitted as evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the repair of the balcony and downspout at the Claimant's home, which were causing interior water damage. The ALJ found that the Claimant failed to prove that the Contractor's performance under the contract was unworkmanlike, inadequate, or incomplete, *ALJ's Proposed Decision* p. 11, and failed to prove the cost to correct or complete the alleged defects in the Contractor's work, *ALJ's Proposed Decision* pp. 12-13.

On exception, the Claimant argued that the ALJ erred in finding that she did not suffer a compensable actual loss because she had to hire another contractor to correct the defects in the Contractor's work and because she had to be hospitalized as a result of mold in her walls.

The Commission finds that the Claimant failed to prove that the Contractor's work was defective for the reasons stated by the ALJ, including, but not limited to: 1) the invoice of Allan Wright, the contractor whom the Claimant hired to correct and complete the Contractor's work, did not identify any deficiencies in the Contractor's work, rather it called for the inspection of the Contractor's work and correction of defects if necessary and included work beyond the scope of the original contract (OAH Hearing, Claimant's Exhibit 14); 2) the photographs Claimant presented to demonstrate that the Contractor's work was deficient were unsupported by testimony as to when they were taken or what they depicted; and 3) Mr. Wright, who the Claimant alleges observed defects in the Contractor's work, did not testify.

The Commission also agrees with the ALJ that, even assuming that the Claimant proved that the Contractor's performance was unworkmanlike, the Claimant failed to prove the cost to correct or complete the Contractor's work. The invoice from Mr. Wright is not itemized and includes work that clearly is beyond the scope of the original contract, such as repair of water damage inside the Claimant's home. (OAH Claimant's Exhibit 14.) Moreover, even if Mr.

Wright's invoice was itemized to allow us to calculate the cost to correct or complete the Contractor's work, the Commission cannot compensate the Claimant for work performed by Mr. Wright because he did not hold a home improvement contractor's license when he performed the work on the Claimant's home.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 27th day of October 2021, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED**;
- D. That the Claimant's Claim is **DENIED**;
- E. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- F. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Robert Altieri
Chairperson –Panel
Maryland Home Improvement
Commission

Sons Roofing, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).²

On December 29, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 22, 2021 at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. The Claimant represented herself. The Respondent represented herself as well. Andrew J. Brouwer, Assistant Attorney General, Department, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing 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 & Supp. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1 "Repair Contract" (Contract), dated May 26, 2017
- Cl. Ex. 2 Conditions of Contract, dated June 20, 2017
- Cl. Ex. 2A PNC Bank payment receipt, dated June 29, 2017
- Cl. Ex. 3 Text messages, varying dates
- Cl. Ex. 4 HIC complaint form, received October 2017
- Cl. Ex. 5 HIC Order sent to Respondent, dated January 4, 2018
- Cl. Ex. 6 HIC letter to Claimant, dated January 25, 2018
- Cl. Ex. 7 HIC complaint form, received October 2017 (showing hand delivery, February 6, 2018)

² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

- Cl. Ex. 8 HIC letter to Claimant, dated January 25, 2018 (annotated with correction to complaint number)
- Cl. Ex. 9 HIC claim form, dated April 12, 2019, with attachment
- Cl. Ex. 10 HIC correspondence to Respondent, dated April 22, 2019
- Cl. Ex. 11 Claimant's record of contacts with HIC, varying dates
- Cl. Ex. 12 [Marked for identification, but not admitted into evidence]
- Cl. Ex. 13 Photograph
- Cl. Ex. 14 & 14A Wright Contracting, LLC, invoice, dated December 19, 2019
- Cl. Ex. 15 Text message, December 23 [no year]
- Cl. Ex. 16 Text message from Allen Wright with photograph, dated December 31, 2018
- Cl. Ex. 17 Photograph, undated
- Cl. Ex. 18 Text message from Allen Wright with photograph, undated
- Cl. Ex. 19 Photograph, undated
- Cl. Ex. 20 Photograph, undated
- Cl. Ex. 21 Text message from Allen Wright with photograph, undated

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

- Resp. Ex. 1 Photograph, dated February 21, 2021³
- Resp. Ex. 2 Photograph, dated February 21, 2021
- Resp. Ex. 3 Photograph, dated February 21, 2021
- Resp. Ex. 4 Photograph, dated February 21, 2021
- Resp. Ex. 5 Photograph, dated February 21, 2021
- Resp. Ex. 6 Photograph, dated February 21, 2021
- Resp. Ex. 7 Photograph, dated February 21, 2021
- Resp. Ex. 8 Photograph, dated February 21, 2021

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

- GF. Ex. 1 Hearing Order, dated December 21, 2020
- GF. Ex. 2 Notice of Hearing, dated January 15, 2021
- GF. Ex. 3 Letter from HIC to Respondent, dated April 22, 2019 (including HIC claim form)
- GF. Ex. 4 Licensing information for Respondent, printed January 29, 2021

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and presented the testimony of her husband, Sturdivant Dunlap.

The Fund did not present the testimony of any witnesses.

³ The date, printed at the bottom of the Respondent's photographs, appears to be the date each photograph was printed.

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 01-92787.
2. The Claimant owns and lives in a stone-faced townhouse in Baltimore City.
3. The Claimant's house was built in the early 1900s.
4. The Claimant's house abutted a neighbor's property on the left. A downspout ran vertically four stories in a groove between the two houses.
5. The Claimant's house has a front facing balcony.
6. Water on the balcony drains into a drainage system that moves water through the house behind its plaster walls to the downspout.
7. The Claimant noticed evidence of water damage to the ceiling and walls of her house and contacted the Respondent to address the leak.
8. On June 20, 2020, the Claimant and the Respondent entered into a Contract to make repairs to the downspout and balcony of the Claimant's house.
9. The original agreed-upon Contract price was \$3,600.00 and was paid in full.
10. The Respondent's work crew removed the existing aluminum downspout and replaced it with a similar aluminum downspout. The Respondent's crew also removed dried foam from behind the downspout and painted the groove behind the downspout with rubber cement.
11. The Respondent's crew also performed some repairs on the balcony floor covering and drain.

12. The Claimant contended that the Respondent failed to adequately perform the contracted work.
13. The Respondent performed the work she was obligated to perform under the Contract.
14. The Respondent's work was not unworkmanlike, inadequate or incomplete.
15. The Claimant hired a subsequent contractor, Allen Wright, to address the leak and the mold that the Claimant found on her walls.
16. Mr. Wright is not presently a licensed home improvement contractor, as his license had lapsed.
17. Mr. Wright performed home improvement work on the property.
18. Mr. Wright did not correct any unworkmanlike, inadequate or incomplete home improvement work performed by the Respondent.
19. Mr. Wright performed home improvement work beyond the scope of the Respondent's Contract with the Claimant.
20. Mr. Wright's invoice and contract with the Respondent was not itemized. Therefore, it could not be determined whether Mr. Wright's work was within the scope of the Respondent's Contract with the Claimant.

DISCUSSION

Legal authorities

The Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is

“more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

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) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401.

For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The home improvement Contract

The Claimant owns and lives in a four-story townhouse in Baltimore City which was constructed at the beginning of the last century. Both the Claimant’s house and a neighboring townhouse, which abuts the Claimant’s house on its left side, are faced in stone. A drain on the front balcony of the Claimant’s house drains water through pipes inside the walls of the house and into the downspout between the properties at the party wall. The downspout, that is the subject of this claim, runs vertically between the Claimant’s house and her neighbor’s house. The downspout is recessed into the façade separating the two houses, so that part of the downspout sits in a groove between the buildings’ fronts. Inside the Claimant’s house, behind its plaster walls, a drainage system moves water from drains, including one below the front balcony, through internal pipes, and out through the downspout.

The Claimant testified that in February or March 2017, she first saw evidence of water on the wall on the third floor ceiling area, on the side of the house where the subject downspout was

located; she testified that the water was dripping down the wall. The amount of moisture she observed was dependent on how much it rained. The Claimant contacted the Respondent to perform home improvement work on the balcony drain and the downspout to stop the leak.

The Respondent inspected the house and wrote the Contract on June 20, 2017, agreeing to perform home improvement work. The scope of the work was as follows:

1. Prep & clean roof of debris and dirt toughly (sic)
2. Over existing roof torch a single ply of modified rubber membrane
3. Flash with rubber openings above white counter flashing metal on balcony roof
4. Prime stone walls where previous contractor applied roof cement, torch modified rubber over roof cement areas
5. Torch down rubber into door threshold
6. Caulk all open joints around window
7. Dry off & clean ledge roof above balcony roof, fully adhere new rubber over existing roof
8. Apply slip metal on ledge roof to help roof look presentable
9. Remove approx. 2' – 3' of downspout at the top near party parapet wall, investigate to see if threw (sic) wall drain is connected to downspout
10. If the wall drain is not connected, reconnect drain pipe inside of existing downspout
11. Remove entire downspout from top of house to bottom coat area behind downspout with liquid rubber membrane
12. Install a new downspout apply masonry grout where needed (this detail will be determined on how far it goes from top to bottom when work is being done, unable to determine at this time).

Cl. Ex. 2. The Contract price was \$3,600.00, with a \$1,200.00 deposit paid on signing. Cl. Exs. 1 and 2A. The Respondent's workmen started the home improvement work a few days after the Contract was signed. The Respondent's husband, who supervised the work, testified that it was satisfactorily completed and the Claimant paid the final installment due under the Contract after her inspection.

Claimant's contentions that the work was not performed completely or in a workmanlike manner

In July 2017, after the work was completed, the Claimant continued to smell moisture in her house. She complains that, although the Respondent installed the rubber membrane on the porch as stated in the Contract, water continued running under the balcony floor, indicating to her that the work was not done properly.

She also contends that the "torching" referenced in the Contract was not completed and unspecified joints were not sealed. She also claimed that the Respondent used the wrong caulking, but could not specify what caulk was used or what should have been used. The Claimant contended that the Respondent had not reconnected the downspout at the top where it connected to the drainage system inside the house, but she did not present any convincing evidence to support that allegation. She was equally not sure whether the Respondent fixed any pipes or connections inside the house.

The Claimant testified she learned about these supposed deficiencies in the Respondent's work from a contractor, Allen Wright,⁴ who she subsequently hired. The Claimant claimed that photographs taken by Mr. Wright proved that the Respondent's work was deficient. Mr. Wright sent photographs to the Claimant (Cl. Ex. 16, 18, 19, and 20) which she believes supports her contention that the Respondent did not install any downspout on the property. The Claimant contends that instead of installing a downspout in the grooved recess between her and her neighbor's house, she claims that the Respondent's crew merely coated the recess with some type of roofing cement and covered it over with siding.

⁴ The Claimant testified that, although Mr. Wright indicated that he was a licensed home improvement contractor, she conceded that his HIC license had since lapsed, and he no longer was licensed home improvement contractor.

Mr. Wright's photographs do not prove this contention. There was no evidence indicating when those photographs were taken – whether they were taken at the start of Mr. Wright's work, evidencing the condition of the Respondent's work prior to demolition, or taken after his work was started, or taken before his work was completed. Mr. Wright was not present at the hearing to explain his photographs, nor was he presented to testify or express an opinion about the quality or completeness of the Respondent's work. Without Mr. Wright's testimony establishing when those photographs were taken and what is shown therein, I cannot determine in what manner the Respondent completed the work.

Although Mr. Wright's invoice indicates that he would remove the gutter system and "re-evaluate" the downspout and balcony floor, the invoice does not identify claimed deficiencies in the work performed by the Respondent (Compl. Ex. 14 and 14A). The "Description" portion of Mr. Wright's invoice does not express any opinion about the Respondent's work, other than its limited discussion of the drainage system:

Work will consist of removing the gutter system and re-evaluating it so that water will reach the downspout. We will then remove the balcony floor where the drainage system is located and then install it the proper way so that all water drains without it sitting. Then we [w]ill go in and check the downspout to ensure that it is hooked up and attached properly....

Cl. Ex. 14. The invoice does not specifically address deficits in the Respondent's work, other than indicating the presence of unspecified leaks:

Wright Contracting LLC will correct leak at [the Claimant's address]:

- (1) Replacing the old gutter system with one that changes the pitch to ensure that the water flows into the proper direction....⁵
- [(2) ...re]move a portion of the balcony flooring to put the pro[per pitc]h in order for the water to drain properly to the downspout.

⁵ Portions of the invoice were partially obliterated when the Claimant copied it (indicated by the ellipses and bracketed portions).

(3) We will remove what concrete⁶ from around the downspout that needs to be, ensuring that it is properly attached to remove water from ~~through~~ (sic) hidden downspout and balcony floor. We will repair any holes in or behind downspout if needed or replacing downspout period. If there is hidden damaged areas homeowner will be advised and billed additionally.

(4) Wright Contracting LLC if needed will reattach and seal around downspout. We will also run a water test to ensure sure that the proper scope of job was completed and done properly.

Cl. Ex. 14 and 14A(sic).

The balance of the invoice addresses interior work that was not only outside the scope of the Respondent's Contract, but did not address the age of the interior wall damage (i.e., whether it pre-existed the Respondent's Contract) or link the damage to work performed by the Respondent.⁷ The Claimant could also not definitively state whether mold occurred before or after the Respondent's work,⁸ she could not recall when she first smelled the mold that may have resulted in her subsequent hospitalization.⁹

The Claimant did not present the testimony of Mr. Wright, nor any other witness, to testify as an expert to prove that the Respondent's work was unworkmanlike, inadequate, or incomplete.¹⁰ To the contrary, the Respondent's husband, who supervised the work, testified in support of the Respondent.

Responding to the Claimant's assertion that no downspout was installed and the recessed groove between the houses was merely covered with siding, the Respondent's husband testified

⁶ Among questions raised by the Respondent regarding Mr. Wright's "invoice," the Respondent's husband testified that if there were cement on the downspout, it would have fallen off the building.

⁷ The Claimant testified that she did not show Mr. Wright the Respondent's Contract, so he would not have known the scope of that Contract to know what work the Respondent contracted to perform.

⁸ The Claimant testified that she was "guessing" about when she discovered the mold, nor could she say "definitely" when it occurred.

⁹ The Claimant provided photographs supporting her hospitalization (e.g., Cl. Ex. 13), but she presented no evidence to link her hospitalization to the mold in her house or its link to the Respondent's work.

¹⁰ Moreover, the scope of the work in Mr. Wright's invoice covered both water drainage and interior plaster and sheetrock repairs, the latter of which were not in the scope of the Respondent's Contract, although the Claimant testified about the presence of wall damage prior to the Respondent's work. Therefore, even if an actual damages were established in this case, the scope of Mr. Wright's work could not be matched to the scope of the Respondent's Contract, which provided for work beyond the scope of that Contract.

that the downspout was removed and replaced with an aluminum downspout matching the downspout that was removed. The Respondent's husband also testified that he observed foam behind the existing downspout, which had to be cleaned out. The Respondent presented pictures to corroborate his testimony. The photographs, taken when the work started before the downspout was installed, shows what appears to be dried foam on the building in the recessed groove, which was visible after the existing downspout was removed (Resp. 2 and 3).

Resp. Ex. 4 is a picture taken during the Respondent's construction showing the removal of the existing downspout. The Respondent's husband testified that the new downspout was installed in ten foot lengths after removing the existing downspout, cleaning out the foam behind it, and coating the space with a rubber cement. Resp. Ex 5 is the "after" picture, showing the installed downspout which appears to have replaced the existing, damaged downspout (Resp. Exs. 3 and 4). Resp. Ex. 6 showed the installation of the rubber membrane over the fourth floor balcony.¹¹

Award

The Claimant, who has the burden of proof in this matter, did not prove that the Respondent performed unworkmanlike, inadequate, or incomplete home improvement work.¹² She speculates about the cause of water damage to her home, which is more than a century old, and has a drainage system which brings rain water inside the walls of her home before

¹¹ The Claimant questioned the Respondent's husband concerning the pitch of the roof and the drain. The Respondent's husband testified, without contradiction, that the pitch could not be changed because it was made of cement, nor could it be altered due to historic preservation regulations governing homes in the Claimant's neighborhood. Furthermore, the Respondent described subsequent blockage of the small diameter (2.5 inch) drain, which could have gotten clogged after the Respondent's work was completed.

¹² The Fund also argued against an award. I independently agree with the Fund's position. Although I am not obligated to follow the Fund's recommendation in reaching a decision, I take it into consideration along with all of the evidence and the presentation of all the parties.

discharging it to a four story downspout. Because of the outcome of this matter, post-construction contact between the parties is immaterial to the decision reached.¹³

The Claimant did not present the testimony of an expert to support her claim or challenge the Respondent's evidence. To prove her claim, the Claimant presented a broadly worded invoice from a subsequent – and presently unlicensed¹⁴ – contractor. Her photographic evidence was confusing and largely unexplained. The Claimant speculated about defects in the Respondent's work, but the Respondent's husband, who was present when the work was performed, countered her assertions point by point. The Respondent failed to produce any compelling evidence that the Respondent did not properly perform his work.

In contrast, the Respondent's pictures, taken before, during and after her company's work, clearly show that the downspout was installed according to the Contract. Due to the complexity of the work performed under the Contract, the age of the house, and the Claimant's allegations that the Respondent merely placed siding over the four story recessed groove instead of installing the downspout in that groove (a contention which was not apparent from the pictures), more convincing evidence would have been required.

Furthermore, assuming, *arguendo*, that the Claimant had proven her claim, I have no evidence from which I could have determined an award from the Fund. Mr. Wright did not see the Respondent's Contract to know what was or was not within its scope. His invoice covered work outside the scope of the Claimant's Contract with the Respondent (e.g., interior plasterwork, mold removal and painting). Even if I were to have found that Mr. Wright

¹³ After the work was completed, the Claimant complained to the Respondent. The Respondent's husband testified that he met with "Derek," who had keys to the Claimant's home and let him in to inspect. The Claimant denied this, but the Respondent's testimony about his latter inspections was consistent, logical and uncontroverted. Evidence of post-improvement inspections is immaterial to the outcome of this matter.

¹⁴ The Claimant testified that Mr. Wright said he was licensed when he did the work, but she discovered that his license had lapsed.

performed any work to correct or complete the Respondent's, there was no way to separate the value of his work within and without that scope, as his contract listed one, undifferentiated price for all the work he completed.

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

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. 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 Guaranty Fund deny the Claimant's claim; and

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

Marc Nachman

May 14, 2021
Date Decision Issued

Marc Nachman
Administrative Law Judge

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#191829

PROPOSED ORDER

WHEREFORE, this 28th day of June, 2021, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*