

IN THE MATTER OF THE CLAIM * BEFORE LOUIS N. HURWITZ,
OF RUSSELL B. WHITTEN * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS AND * OAH NO.: DLR-HIC-02-10-29550
OMISSIONS OF MICHAEL * MHIC NO.: 09 (90) 664
GREASLEY, *
T/A PRO DESIGN & BUILD, INC. *

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On or about December 15, 2008, Russell B. Whitten (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,450.00 for actual losses suffered as a result of home improvement work performed in an unworkmanlike, inadequate or incomplete manner by Michael Greasley, t/a Pro Design & Build, Inc. (Respondent).¹

I conducted a hearing in this matter on October 26, 2010 at the Carroll County

¹ The OAH file also includes a reference to a trade name the Respondent previously used. Effective January 24, 2008, and at all times relevant to this matter, the Respondent has been trading as Pro Design & Build, Inc.

Public Library in Sykesville, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2010). Eric B. London, Assistant Attorney General, represented the Fund. The Claimant appeared on his own behalf. The Respondent, after receiving due notice of the hearing, did not appear.

Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02 and 09.08.03; COMAR 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent and, if so, what should be the monetary award?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following exhibits, which were admitted into evidence:

- | | |
|-----------|---|
| CL #1 | Cancelled checks dated August 19, 2008 and August 26, 2008 and Bank Of America documentation of checks issued on August 1, 2008 and August 6, 2008 |
| CL #2 | E-mail from Microsoft Exchange to rcrawley@dflr.state.md.us , dated November 14, 2008 and a confirmatory e-mail from Rence Crawley, dated November 18, 2008; and a letter from the Carroll County Board of Permits & Inspections to the Respondent, dated November 6, 2008 |
| CL #3A-3G | Seven photographs of the property, taken on September 17, 2008 |

- CL #4 Report of Denny Taylor, Taylored Inspections & Finishes, dated September 17, 2008²
- CL #5 Residential Improvement Agreement between the parties, dated July 16, 2008
- CL #6 Residential Improvement Agreement between the parties, dated July 16, 2008³

The Respondent did not submit any exhibits for inclusion into evidence.

The Fund submitted the following exhibits, which were admitted into evidence:

- GF #1 Notice of Hearing, dated August 19, 2010, with Hearing Order, dated October 3, 2008, with attached Certified Mail Receipt and "green card," signed by Farrah Greasley as received on August 30, 2010
- GF #2 Respondent's MHIC licensing history and business address of record as of October 5, 2010
- GF #3 Hearing Order, dated August 9, 2010
- GF #4 Home Improvement Claim Form, received by the MHIC on December 10, 2008
- GF #5 MHIC letter to the Respondent, dated December 29, 2008
- GF #6 Carroll County Bureau of Building Permits & Inspection disapproval notice, with note to the Respondent, dated August 15, 2008
- GF #7 Building Permit No. 08-1676(5), dated July 30, 2008

Testimony

The Claimant testified on his own behalf and presented no other witnesses.

No witnesses appeared on behalf of the Fund.

² Photographs contained in the report are erroneously dated January 27, 2003.

³ The difference between CL #5 and CL #6 is that CL #6 is signed by the Respondent.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent was licensed by the MHIC as a contractor at all times relevant to this case. As of the date of the hearing, he was still licensed by the MHIC, albeit in a suspended status, effective August 5, 2010.
2. On July 16, 2008, the Claimant entered into a contract with the Respondent to perform certain home improvement work at the Claimant's property.
3. The contract called for the following work to be performed at the Claimant's residence at 1861 Stafford Court, Sykesville, Maryland:
 - construct a 16-foot by 20-foot covered deck/porch at the rear of the Claimant's property
 - acquire necessary permits
 - complete all county inspections
 - remove existing gutters/downspouts where new covered deck is built
 - dig holes for footer posts
 - pour concrete for footer posts
 - complete all framing with pressure treated lumber
 - complete framing to Code
 - install six-inch by six-inch posts for support from ground to trusses
 - install proper hangers, plates and spacers on joists, trusses and roof (and tie into existing roof)
 - build and install new trusses for covered deck

- install tar paper and staples on covered deck
- install shingles on covered porch and tie into existing roof, matching existing style and color
- install composite wrap on posts/columns
- install composite wrap for deck hand board frame
- remove all debris from project and clean job site
- complete final walk through with homeowner

The parties agreed that the work would be completed for \$7,650.00.

4. Shortly after the parties entered into the contract, the Claimant made a down payment by check in the amount of \$2,700.00, which was processed by the bank on August 1, 2008.
5. On July 30, 2008, Carroll County, Maryland Bureau of Permits and Inspections (the County) issued a building permit for the project. On or about that date, the Respondent began working on the project.
6. On August 1, 2008, an inspector for the County inspected the footing on the job and authorized the Respondent to proceed with the project.
7. The Claimant made an additional payment by check to the Respondent in the amount of \$2,000.00, which the bank processed on August 6, 2008.
8. The Respondent completed the project on or before August 15, 2008.
9. On August 15, 2008, the County left notice at the property that it failed to approve the construction for the following reasons:
 - a. overspan floor joist at the end are insufficient to carry the roof load
 - b. overspan two by six headers carry roof rafters

- c. patching and connecting the roof to the existing house is unacceptable
 - d. there is a hump in the roof
10. The Respondent returned to the property on August 15, 2008 and made an attempt to correct the problems cited by the County.
 11. A County inspector reviewed the project again, but he did not climb a ladder to examine all of the remedial work.
 12. On August 19, 2008, the Claimant issued the Respondent payment by check in the amount of \$2,000.00.
 13. On August 21, 2008, the County conducted a final building inspection and approved the completed work, issuing a Use and Occupancy Permit (no. 08-1676).
 14. Although he had questions about the quality of the work performed, the Claimant issued the Respondent a final payment by check, dated August 26, 2008, in the amount of \$950.00.
 15. In all, the Claimant paid the Respondent a total of \$7,650.00.
 16. Although the Claimant does not have expertise in the field of construction, he observed that the structure the Respondent constructed was "crooked" and "twisted." The Claimant also noticed that water was leaking into the enclosed porch.
 17. After the Claimant made final payment to the Respondent on August 26, 2008, the Respondent made appointments to return to the property to make corrections, but he failed to keep those appointments.

18. On September 17, 2008, the Claimant contracted with an independent inspector, Denny Taylor, of Taylored Inspections & Finishes, who came to the property and conducted an inspection of the work the Respondent performed. Mr. Taylor made the following findings, which I adopt as fact:

- a. the addition's roof has some uneven areas or "humps"
- b. the addition's roof's valleys do not have metal, ice guard or anything other than felt paper under the shingles-at least one of the three items should be installed under the felt paper
- c. there is ongoing water penetration caused by a leak in the roof's valley
- d. the roof framing requires repair or servicing for the following reasons:
 - i. there is no ridge board to carry the ridge
 - ii. a beam was installed, but the rafters do not sit on the beam, as required
 - iii. the rafter lacks a "bird's mouth" cut into the rafter, which allows for outward, instead of downward pressure
 - iv. there are gaps between the rafters, which can cause sagging
 - v. the beams the rafters sit on are badly bowed
 - vi. the valley rafters have no support under the end that comes into contact with the old roof
 - vii. the two-by-ten beams should be tied into the house
 - viii. there are two areas of the rafter overhang where the sheathing is exposed

19. The Claimant paid Mr. Taylor \$200.00 to inspect the work performed by the Respondent and to produce a report of his findings.
20. In a letter dated November 6, 2008, the County revoked Use and Occupancy Permit no. 08-1676, giving the following deficiencies, which I adopt as fact:
 - a. all support posts are out of plumb, some by as much as two inches
 - b. the rafters on the return gable were not cut level to the existing roof or nailed to the existing roof
 - c. the fascia is not contiguous with the existing roof, leaving an opening over the existing roof
 - d. the ridge and rafters were not completed to the existing roof, leaving overspan plywood
 - e. the rafters at the girders do not have a level heel cut
 - f. the plywood on the return gable is raised off the roof
21. On or about November 11, 2008, the Claimant obtained an estimate from Keppler Contracting Company for repairing and reconstructing various portions of the screened porch constructed by the Respondent. The estimate, in the amount of \$5,250.00, was limited to the correction of the work performed by the Respondent.
22. On or about December 10, 2008, the Claimant filed a Fund claim in the amount of \$5,450.00, alleging that a number of items had been performed in an unworkmanlike, inadequate, or incomplete manner.
23. The deck addition constructed by the Respondent at the Claimant's residence is without a County-issued use and occupancy permit.

24. The Respondent has not returned any of the funds the Claimant paid to him.

DISCUSSION

I. Respondent's Failure to Appear

The OAH mailed notice of the hearing to the Respondent by certified and regular mail to the Respondent's Elkridge, Maryland business address of record on file with the MHIC. The Respondent has had an MHIC license at all times relevant to the filing of the claim and has been licensed continuously from the date the Notice of Hearing was mailed at least through the date of the hearing, albeit his license has been in suspension status since August 5, 2010. The OAH notice advised the Respondent of the time, place and date of the hearing. Counsel for the Fund verified that the Elkridge address is the Respondent's current MHIC address of record.

The first class mail envelope sent to the Respondent's Elkridge address on August 19, 2010 was not returned by the USPS as undeliverable. The notice sent certified mail, return receipt requested, to the Respondent's Elkridge address was received at that address, as documented by the return receipt "green card" that was signed for by Farrah Greasley on August 30, 2010, and returned to the OAH as evidence of delivery. I find that the Respondent received due notice, via first class mail, to appear at the hearing but failed to appear, and therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312 (h) (2010).

II. The Merits of the Case

Section 8-405 of the Business Regulation Article provides that an owner may recover compensation of up to \$20,000.00 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

(2010). Section 8-401 defines "actual loss" as "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).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(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.

On or about July 16, 2008, the Claimant entered into a contract with the Respondent to perform home improvement work, for the amount of \$7,650.00, at the Claimant's property. The contract called for the Respondent to construct a "covered deck/porch" on the back of the Claimant's residence at 1861 Stafford Court, Sykesville, Maryland (the property). The Respondent applied for a County building permit, which he received on July 30, 2008. He began digging the posts, which he set in concrete. On August 1, 2008, the County inspected and approved the footing and the Respondent continued working on the project. Upon completion, on August 15, 2008, the County inspected the Respondent's work and failed to approve for the following reasons: the overspan floor joists at the end are insufficient to carry the roof load; overspan two by six headers carry roof rafters; patching and connecting the roof to the existing house is unacceptable; and there is a hump in the roof. The Respondent attempted to correct the deficiencies noted by the County inspector.

On August 21, 2008, despite the work still not being completed in an adequate and workmanlike fashion, the County performed a final building inspection and issued a use and occupancy permit. The Claimant, who is not a home improvement professional, noticed problems with the structure, including that it was "totally crooked." The Respondent last came to attempt to correct the problems on August 26, 2008. Despite the fact that the problems were not remedied, the Claimant made a final payment to the Respondent. In all, the Claimant paid the Respondent the full \$7,650.00 agreed upon in the contract. The Respondent did not refund any of the payments to the Claimant.

The deficiencies in the work are documented by the report of Denny Taylor, an inspector hired by the Claimant, and by the County's subsequent acknowledgement in a

letter, dated November 6, 2008, of the numerous workmanship problems with the structure. The County also revoked the use and occupancy permit it had issued earlier for the addition.

The Claimant obtained an estimate from Keppler to correct the deficiencies in the work performed by the Respondent. The Keppler estimate, in the amount of \$5,250.00, proposes to remove the portion of the porch over the existing house roof (ridge and valleys); install two by ten toe boards for new valley rafters; move the two by ten ridge pole from the existing screen porch ridge to the existing house roof; install two by eight rafters at 24 inches on center (the rafters are to be attached to the new ridge pole and new toe boards); install new roof sheathing, roof paper, and matching shingles; remove the existing house overhang inside of the screened porch; frame the wall from the existing house up to the screened porch roof; cover the new wall surface with oriented strand board (OSB) and finish with white vinyl board and batten siding; remove screen sections from the porch for possible re-installation; temporarily support screened porch roof and make necessary adjustments to level roof beam (level beam side-to-side and front-to-back); re-install screening using previously removed materials and additional required material; and remove and dispose of job-related debris. The Claimant has not yet contracted with Keppler for the above-described work to be performed.

The unrefuted testimony and documentary evidence presented by the Claimant shows that he suffered an actual, measurable loss as a result of the Respondent's unworkmanlike, inadequate, or incomplete home improvement within the definition found in section 8-401 of the Business Regulation Article. Proper notice was given to the Respondent, who is currently licensed by the MHIC, but in suspension status as of

August 5, 2010,⁴ at his MHIC address of record. The Respondent elected not to appear and respond to the Claimant's allegations.

The Claimant presented copies of checks and other bank documents to show that he paid the Respondent the sum of \$7,650.00, none of which was returned to him. The Claimant paid \$200.00 to Taylored Inspections & Finishes for Denny Taylor's inspection and report. However, the amount paid to Taylored Inspections & Finishes is considered consequential damages and is not compensable under COMAR 09.08.03.03B(1)(a). The cost of correcting and completing the work undertaken is \$5,250.00.

I find, from the documents presented, that the Respondent was licensed at the time of the Claimant's loss. The burden of proof in this case rests with the Claimant to establish, by a preponderance of the evidence, that he should be reimbursed for actual losses suffered as a result of an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. §§ 8-405(a), 8-407(c)(1) (2010) and Md. Code Ann., State Gov't. § 10-217 (2009).

The evidence before me supports a finding that the work undertaken by the Respondent was unworkmanlike, inadequate, or incomplete. COMAR 09.08.03.03B(3)(c), as set forth above, establishes the methods for determining actual loss when the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract. In that case, the Claimant's actual loss shall be the amount which the Claimant paid to the original contractor, added to any reasonable amounts the Claimant has paid or will be required to pay another

⁴ Respondent's HIC license suspension is the result of two unrelated HIC complaints filed against him.

contractor to repair poor work done by the original contractor and complete the original contract, less the original contract price.

Thus, the calculations under COMAR 09.08.03.03B(3)(c) establish the Claimant's loss as follows:

Paid to Respondent under contract	\$7,650.00
Amount to be paid to another contractor to correct/complete work	+ 5,250.00
	<u>\$12,900.00</u>
Original contract price	- 7,650.00
Total amount of loss	<u>\$5,250.00</u>

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has sustained an actual loss compensable by the MHIC Fund as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2010) and COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER


I RECOMMEND that the MHIC:

ORDER that the Claimant be awarded \$5,250.00 from the MHIC Fund; and

ORDER that the Respondent be ineligible for an MHIC license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the 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.

January 19, 2011
Date Decision Mailed



Louis N. Hurwitz
Administrative Law Judge

LNH
#11742

IN THE MATTER OF THE CLAIM * BEFORE LOUIS N. HURWITZ,
OF RUSSELL B. WHITTEN * AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME * OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND * OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS AND * OAH NO.: DLR-HIC-02-10-29550
OMISSIONS OF MICHAEL * MHIC NO.: 09 (90) 664
GREASLEY, *
T/A PRO DESIGN & BUILD, INC. *

* * * * *

EXHIBIT LIST

The Claimant submitted the following exhibits, which were admitted into evidence:

- CL #1 Canceled checks dated August 19, 2008 and August 26, 2008 and Bank Of America documentation of checks issued on August 1, 2008 and August 6, 2008
- CL #2 E-mail from Microsoft Exchange to rcrawley@dlr.state.md.us, dated November 14, 2008 and a confirmatory e-mail from Rence Crawley, dated November 18, 2008; and a letter from the Carroll County Board of Permits & Inspections to the Respondent, dated November 6, 2008
- CL #3A-3G Seven photographs of the property, taken on September 17, 2008
- CL #4 Report of Denny Taylor, Taylored Inspections & Finishes, dated September 17, 2008⁵
- CL #5 Residential Improvement Agreement between the parties, dated July 16, 2008
- CL #6 Residential Improvement Agreement between the parties, dated July 16, 2008⁶

⁵ Photographs contained in the report are erroneously dated January 27, 2003.

⁶ The difference between CL #5 and CL #6 is that CL #6 is signed by the Respondent.

The Respondent did not submit any exhibits for inclusion into evidence.

The Fund submitted the following exhibits, which were admitted into evidence:

- GF #1 Notice of Hearing, dated August 19, 2010, with Hearing Order, dated October 3, 2008, with attached Certified Mail Receipt and "green card," signed by Farrah Greasley as received on August 30, 2010
- GF #2 Respondent's MHIC licensing history and business address of record as of October 5, 2010
- GF #3 Hearing Order, dated August 9, 2010
- GF #4 Home Improvement Claim Form, received by the MHIC on December 10, 2008
- GF #5 MHIC letter to the Respondent, dated December 29, 2008
- GF #6 Carroll County Bureau of Building Permits & Inspection disapproval notice, with note to the Respondent, dated August 15, 2008
- GF #7 Building Permit No. 08-1676(5), dated July 30, 2008

PROPOSED ORDER

WHEREFORE, this 9th day of March 2011, 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