

IN THE MATTER OF THE CLAIM OF	*	BEFORE STEPHEN J. NICHOLS,
STEVE HOESCH	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE	*	OF THE MARYLAND OFFICE
MARYLAND HOME IMPROVEMENT	*	OF ADMINISTRATIVE HEARINGS
GUARANTY FUND ON ACCOUNT OF	*	OAH CASE NO.: DLR-HIC-02-12-27938
HOME IMPROVEMENT WORK	*	MHIC FILE NO.: 11 (90) 707
UNDERTAKEN BY	*	
WAYNE A. PRESTON T/A	*	
PRESTON HOME IMPROVEMENTS, LLC	*	

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

This case arose because of a complaint filed by Steve Hoesch (Claimant) with the Maryland Home Improvement Commission (MHIC) against Wayne A. Preston t/a Preston Home Improvements, LLC (Respondent). The complaint asserts that the Claimant entered into a contract with the Respondent for the performance of home improvement work at his residence. The complaint alleges that the Respondent's performance of the contracted work was inadequate and unworkmanlike.

On August 2, 2011, the Claimant filed a claim with the MHIC seeking to recover \$5,625.00 from the Home Improvement Guaranty Fund (Fund). On July 3, 2012, the MHIC issued an order for a hearing on the claim against the Fund.

On May 1, 2013, the above-captioned case was heard before Stephen J. Nichols, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010 & Supp. 2012). The hearing was conducted at the Administrative Law Building located in Hunt Valley, Maryland.

The Claimant appeared and represented himself. The Respondent appeared and represented himself. Jessica Berman Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern the 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, COMAR 09.08.02.01, COMAR 09.08.03.03; COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent under a home improvement contract within the meaning of section 8-401 of the Business Regulation Article of the Annotated Code of Maryland; and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following items were admitted into the record:

Fund Exhibit #1 – Copy of a Notice of Hearing, dated January 17, 2013, and copy of an Order for Hearing, dated July 3, 2012 (eight pages & envelope)

Fund Exhibit #2 – Copy of a Transmittal Form, Order for Hearing, and Home Improvement Claim form (four pages)

Fund Exhibit #3 – Dept. of Labor, Licensing & Regulation I.D. Registration Inquiry on the Respondent, dated April 23, 2013 (four pages)

Fund Exhibit #4 – Affidavit of Thomas Marr, IV, dated February 16, 2013

Fund Exhibit #5 – Copy of an August 3, 2011 letter from the MHIC to the Respondent and a copy of a Home Improvement Claim form, dated August 2, 2011 (two pages)

Claimant Exhibit #1 – Copy of an October 21, 2010 letter to the Claimant from Warranty Services, copy of a November 3, 2010 letter to the Claimant from Warranty Services, and a copy of a November 3, 2010 letter to Greg Barth, Norandex Building Materials Distribution, Inc. (five pages)

Claimant Exhibit #2 – Nine photographs, marked individually on the reverse as “A” through “I”

Claimant Exhibit #3 – Estimate/Proposal from Amazing Home Contractors, Agreement from Dove Remodeling Services, Inc., and Wholesale & Retail Siding Contract from Champion (three pages)

Claimant Exhibit #4 – Copies of the front and back of four Susquehanna Bank checks, numbered 115, 118, 135 & 125 (four pages)

No other exhibits were offered into evidence.

B. Testimony

The Claimant testified on his own behalf. The Respondent testified on his behalf. No other witnesses were called to testify.

FINDINGS OF FACT

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. At all times relevant, the Respondent was a home improvement contractor licensed with the MHIC under contractor license numbers 01-90253 and 05-123414 (trade name).

2. At all times relevant, the Claimant owned and lived at the residence located at 6503 Golden Ring Road, Baltimore, Maryland (the property). The property is a two-story, single-family home.

3. On or about October 3, 2008, the Claimant and the Respondent, as the result of oral agreement, entered into a home improvement contract for the Respondent to demolish the existing second floor of the property, build a second-floor outer shell, install roofing, finish three bedrooms and a full bathroom on the new second floor, install new windows, build a new porch on the back of the property, build a new porch on the front of the property, and install vinyl siding over the exterior of the existing house and the addition. This contract arose from a series of discussions that the Claimant and the Respondent had over a period of approximately twelve months. Under the terms of the contract, the Respondent promised to provide the labor, supervision for the work, and to act as the Claimant's consultant for the home improvement project. The Claimant promised to pay for and provide all materials and supplies for the performance of the work.

4. The contract price to be paid to the Respondent for the home improvement work at the property was \$30,000.00.

5. On or about October 3, 2008, work commenced on the home improvement project.

6. The Respondent was at the property and in charge of the work as it was being performed. The Respondent's work crew at the property consisted of one to three workers. The Respondent personally performed about half of the siding installation. As materials were needed, the Respondent would give the Claimant instructions (quantity, source, and measurements) on what he needed to purchase in order for the work to progress. The Claimant obtained, paid for, and delivered (or, arranged for delivery of) the materials to the property.

7. The performance of the home improvement work at the property took place during October and November 2008. The work was completed on or about November 3, 2008.

8. During performance of the work, the Respondent instructed the Claimant to purchase Cedar Grain Select non-insulated vinyl siding in required quantities from Norandex Building Materials Distribution, Inc. The Claimant obtained the vinyl siding as instructed, paid \$2,595.78 to Norandex Building Materials Distribution, Inc., and delivered the materials to the job site.

9. The Respondent was paid \$30,000.00 for his work at the property. This was accomplished by a series of four checks drawn on the Claimant's account at the Susquehanna Bank. The first check was delivered to the Respondent when the work began. Two checks were delivered to the Respondent while the work was in progress. The last check was delivered when the work was finished. The Respondent negotiated and cashed the four checks.¹

10. Initially, the Claimant was well-satisfied with the work performance and the outcome of the Respondent's work at the property.

11. During the summer of 2010, the Claimant noticed what appeared to buckling and a wavy appearance in the vinyl siding. With passage of time, these conditions became more apparent throughout the exterior at the property.

12. After noting the buckling in the siding, the Claimant telephoned the Respondent in an attempt to have the Respondent address his concerns with the home improvement work. The Respondent agreed to return to the property and inspect the work. During discussion, the Respondent indicated to the Claimant that what he was noticing on the exterior of his house might be symptomatic of defective manufacture of the Cedar Grain Select non-insulated vinyl siding that had been used.

¹ When totaled, the four checks add up to \$31,793.52. The Claimant testified that the payments in excess of \$30,000.00 were made to the Respondent to reimburse him for some materials and supplies that the Claimant was contractually obligated to provide, but the Respondent had obtained, had paid for, and had delivered to the job site.

13. The Claimant notified Norandex Building Materials Distribution, Inc., that the vinyl siding he had been sold and had installed at the property was buckling.

14. On about October 21, 2010, Warranty Services sent a letter to the Claimant acknowledging that a claim against the warranty of the Cedar Grain Select non-insulated vinyl siding sold to him by Norandex Building Materials Distribution, Inc., had been received. The Claimant was notified that a Warranty Services Field Representative, who was also a certified Vinyl Siding Institute (VSI) Installation Trainer, would be contacting him to arrange for an inspection at the property.

15. On October 27, 2010, Andrew A. Kurtas, III, Warranty Services Field Supervisor, in the company of the Claimant and two representatives from Norandex Building Materials Distribution, Inc., performed a field inspection of the vinyl siding at the property. Before the inspection, Mr. Kurtas left a timely message at the contact telephone number for the Respondent in order to notify him of the scheduled inspection, but the Respondent did not attend and participate in the inspection. After the inspection was completed, Mr. Kurtas prepared a detailed report of what he had observed. The Claimant received a copy of the report prepared by Mr. Kurtas. The report, in pertinent part, reads:

[T]he problems with the material on the above property are not the result of manufacturing defects in the material. They are the result of the application techniques used to install the material and/or accessory items plus a substrate issue. Our warranty states that the installation of the material is not covered by our company. Any and all warranty coverage for the installation of the material is the responsibility of the contractor who applied the material. At this time, we must request that you direct any future questions or concerns back to the installer who applied the material.

16. On March 19, 2011, several months after he had been notified of the Claimant's concerns, the Respondent visited the property, met with the Claimant, and inspected the work. The Respondent told the Claimant that he thought the problem lay with defective manufacture,

not the installation of the vinyl siding; but, regardless, he would try to satisfy the Claimant's concerns.

17. The Respondent and the Claimant scheduled thirteen planned dates for the Respondent to return to the property in order to inspect the vinyl siding or perform corrective action. The Respondent actually returned to the property on only three of those occasions and performed corrective action. The corrective action performed by the Respondent on those three occasions lasted approximately eight hours. The Respondent's corrective action did not alleviate the Claimant's concerns and did not correct the appearance of the vinyl siding.

18. When the vinyl siding was installed at the property, the following unworkmanlike or inadequate conditions -- that were the Respondent's responsibility to have performed correctly or adequately -- existed:

- i. Directional nailing was present. Instead of fasteners on vinyl panels being centered in the nail slots in accordance with the manufacturer's specifications, fasteners were installed in opposite ends of the nail slots. Directional nailing restricts panels from being able to expand and contract and may cause buckling. This condition was most evident on the left wall at the property.
- ii. Insufficient nailing was present. Fasteners were placed in a nailing pattern between 24" to 54" apart; this was farther apart than the maximum of 16" as required by the manufacturer's specifications. Not enough fasteners were used to properly support the materials which may cause vinyl panels to distort, buckle, unhook and/or fall off. This condition was most evident on the front, left, and right walls at the property.
- iii. Fasteners were not driven into a nailable surface. If fasteners are not driven into a nailable surface, the siding will not be properly supported which may cause vinyl panels to distort, buckle, unhook and/or fall off. This condition was most evident on the right wall at the property.
- iv. Utility trim was not used to secure the siding. Utility trim is used to support the siding when the nailing flange has been cut off of the panel. This is typically the case at the top and bottom of windows, doors, and the top of a wall. Utility trim was not used as required by the manufacturer's specifications. This condition was most evident on the front of the property.

- v. Insufficient locking or engaging of panels was present. Each row of panels must be securely locked along the entire length of the siding panel before it is fastened. Some panels were not pulled up and engaged properly. This condition was most evident on the front of the property.
- vi. Tight laps (panels were lapped too much) were present. Panels should be lapped at approximately one inch in order to meet manufacturer's specifications. Some of the panels were lapped approximately two to three inches. Tight laps do not allow for proper expansion and contraction and may cause buckling. This condition was most evident on the front and right walls of the property.

19. On August 2, 2011, the Claimant filed a claim against the Fund.

20. The fair market value of the cost to remove the existing vinyl siding and replace with new siding in order to correct the appearance of the work that the Respondent had been obligated to perform at the property is \$13,750.00.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2012).² Under this statutory scheme, licensed contractors are assessed for the monies that subsidize the Fund. Homeowners who are victimized by the actions of licensed contractors may recover their "actual losses" from this pool of money, subject to a \$20,000.00 limitation on the claim of any one aggrieved homeowner because of the work of any one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (Supp. 2012). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2012). When the Fund pays money to a homeowner as a result of the faulty performance of a home

² Unless otherwise noted, all references to the Annotated Code of Maryland, Business Regulation Article are to the version published in the 2010 Replacement Volume.

improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she fully effectuates reimbursement. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss” as defined by statute and regulation. “[A]ctual 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. “The Fund may only compensate for actual losses [Claimant] incurred as a result of misconduct by a licensed contractor.” COMAR 09.08.03.03B(2). “At a hearing on a claim, the claimant has the burden of proof.” Md. Code Ann., Bus. Reg. § 8-407(e)(1).

The Maryland Court of Appeals has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85, 93 A.2d 269, 272 (1952), the Court held, “[t]he obligation to perform work with skill and care is implied by law and need not be stated in [any] contract.” That rule was reaffirmed in *Worthington Construction Corp. v. Moore*, 266 Md. 19, 22, 291 A.2d 466, 467 (1972). In *K & G Construction Co. v. Harris*, 223 Md. 305, 314, 164 A.2d 451, 456 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the “workmanlike manner” wording was equivalent to the “skill-and-care” wording.

A “workmanlike manner” has also been defined as “[t]he customary way of doing the work in the vicinity of the place where the work is to be done” and “[a] manner of work adequate for the performance of the particular undertaking.” *Ballentine’s Law Dictionary* 1377 (1969) (citations omitted).

The Claimant, initially, was satisfied with the outcome when the Respondent finished the home improvement work during November 2008. During the summer of 2010, the Claimant

noticed what appeared to be buckling and a wavy appearance in the vinyl siding. With passage of time, these conditions became more apparent. During the hearing, the Claimant presented photographs that clearly demonstrate these conditions. The Claimant notified the Respondent and Norandex Building Materials Distribution, Inc., the distributor of the Cedar Grain Select non-insulated vinyl siding that had been used, of the buckling in the vinyl siding. The distributor arranged for a Warranty Services inspector, who was a certified VSI Installation Trainer, to perform an inspection of the vinyl siding at the property.

The inspection revealed that the Respondent's installation of the vinyl siding did not meet the manufacturer's specifications. The deviations from those standards included directional nailing, insufficient nailing, tight laps, and utility trim not being used to secure the siding. Fasteners to secure vinyl panels not being driven into a nailable surface and insufficient locking or engaging of panels were also noted. The evidence regarding these deviations and conditions was not disputed and is also not disputed that buckling and wavy appearance in vinyl siding may result from such deviations and conditions.

The Respondent stated that his performance installing the vinyl siding met trade standards. The Respondent indicated that trade standards may be different from the specifications of material manufacturers. The ALJ rejects this argument. The Respondent directed the Claimant to obtain Cedar Grain Select non-insulated vinyl siding for use on the job. In order for the installation of the vinyl siding to have been performed with skill and care, the installation of the materials must meet the manufacturer's specifications. If vinyl siding is not installed in accordance with specifications, the manufacturer may void the warranty guarantee accompanying the product rendering the performance of the work inadequate. A failure to install vinyl siding in a manner not consistent with the manufacturer's specifications is inherently inadequate and unworkmanlike.

The Respondent suggests that the buckling and wavy appearance in the vinyl siding on the “driveway wall” (the left wall of the house when facing the front of the home) was caused by the removal of bracing in the gable of the roof by a later-employed HVAC installer and/or an uneven underlying wall surface (variation as much as one to two inches in some areas as noted in the Warranty Services inspector’s report). Even if the underlying wall surface of the driveway wall contributed to the buckling and wavy appearance, it was the Respondent’s responsibility, as the licensed contractor in charge of the work, to direct corrective action be performed to properly prepare the wall surface before the vinyl siding was installed. This the Respondent did not do and his performance in that regard, therefore, was inadequate.

The Respondent’s alleged excuses for the outcome of his work do not cover all the buckling and waving appearance problems at the property. The deviations from the manufacturer’s specifications and poor workmanship existed throughout the exterior of the property, not just on the “driveway wall.” Having carefully reviewed the entire record and having considered the arguments of the parties, the ALJ concludes that the buckling and wavy appearance in the vinyl siding at the property was the result of the Respondent’s unworkmanlike and inadequate installation.

Even if there was some merit in the Respondent’s alleged excuses for the outcome of his work with respect to the driveway wall, the Respondent acknowledged, during cross-examination, that replacing the existing siding with new siding on all but one wall at the property would result in an unprofessional and inadequate outcome as the panels would not likely match up in color (because of fading) and panel alignment. In order to repair and correct the Respondent’s unworkmanlike and inadequate installation of the vinyl siding on the non-driveway walls, all of the exterior walls of the vinyl siding at the property must be replaced.

The Claimant presented estimates from three MHIC licensed contractors on the cost to remove the existing siding and replace with a new siding product. The Estimate/Proposal from Amazing Home Contractors must be discounted as it includes using insulated vinyl siding and P.V.C. Trimm Coil; those materials are not comparable in value to what was used during the Respondent's siding installation. The Wholesale & Retail Siding Contract from Champion includes removal of the existing Tyveck substrate on all four walls of the property and the installation of a Champion brand substrate. As there is no evidence that removal of the substrate from all four walls is required to repair and correct the Respondent's work, this estimate must also be discounted. The estimate submitted by the Claimant from Dove Remodeling Services, Inc., meets the mark. Dove Remodeling Services proposes to use non-insulated vinyl siding and does not specify the removal of the existing Tyveck substrate from all four walls. Therefore, the ALJ accepts the Claimant's proof that the fair market value of the cost to replace the vinyl siding, repair the Respondent's work, and restore the exterior appearance at the property would be equivalent to the Dove Remodeling Services' work estimate. (Finding of Fact #20)

Because of the Respondent's "misconduct" described above, the Claimant has established an entitlement to reimbursement on his claim against the Fund. COMAR 09.08.03.03B(2); Md. Code Ann., Bus. Reg. § 8-401. COMAR 09.08.03.03B(3) sets forth the following formulas for determining an "actual loss:"

(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 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)(a) and (3)(b) do not apply to the facts as found. The ALJ will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(c). The calculations follow:

\$30,000.00	Paid to Respondent by the Claimant
+ <u>\$13,750.00</u>	Cost to repair the outcome of the Respondent's work
\$43,750.00	(Expenditure Subtotal)
- <u>\$30,000.00</u>	Original Contract Price
\$13,750.00	Actual Loss

Pursuant to COMAR 09.08.03.03B(3)(c), the Claimant has demonstrated an "actual loss" of \$13,750.00. Md. Code Ann., Bus. Reg. § 8-401.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Claimant has sustained an "actual loss" as a result of the Respondent's acts and omissions in the amount of \$13,750.00. Md. Code Ann., Bus. Reg. § 8-401; COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Maryland Home Improvement Commission:

ORDER, that the Claimant be awarded \$13,750.00 from the Maryland Home Improvement Guaranty Fund to compensate him for “actual losses” sustained by the “acts and omissions” of the Respondent under section 8-409 of the Business Regulation Article of the Annotated Code of Maryland; and further,

ORDER, that the Respondent be ineligible for any MHIC license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to section 8-411 of the Business Regulation Article of the Annotated Code of Maryland; and further,

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

Signature on File

June 6, 2013
Date Decision Mailed

SJN:sn
#142344v1

Stephen J. Nichols
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 28th day of June 2013, 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
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION

**The Maryland Home
Improvement Commission**

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

**v. Wayne Preston
t/a Preston Home Improvements, LLC
(Contractor)
and the Claim of
Steve M. Hoesch
(Claimant)**

MHIC No.: 11 (90) 707

FINAL ORDER

**WHEREFORE, this January 7, 2014, Panel B of the Maryland Home Improvement
Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated June 28, 2013 are
AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated June 28, 2013 are
AFFIRMED.**
- 3. The Proposed Order dated June 28, 2013 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date. During
the thirty (30) day period, any party may file an appeal of this decision to Circuit
Court.**

***Joseph Tunney*
Joseph Tunney, Chairperson
PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION