

IN THE MATTER OF THE CLAIM	*	BEFORE JOHN T. HENDERSON, JR.
OF NAJAH EL-KHOURI AND	*	ADMINISTRATIVE LAW JUDGE
BARHOUM KHOURI,	*	THE MARYLAND OFFICE
CLAIMANTS <sup>1</sup> ,	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	OAH NO.: DLR-HIC-02-15-07772
IMPROVEMENT GUARANTY FUND	*	MHIC NO.: 12 (90) 1346
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF	*	
DANIEL A. PETERSON, T/A	*	
INTEGRITY HOME PRO	*	
RESPONDENT	*	

\* \* \* \* \*

**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 December 22, 2014, Najah El-Khoury (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,535.00 for actual losses allegedly suffered as a result of a home improvement contract with Daniel A. Peterson, t/a Integrity Home Pro, (Respondent or Integrity).

---

<sup>1</sup> At the hearing, Barhoum Khoury, brother of the Claimant, and who shared the subject property with her, was added as a claimant to this matter and will be referred to for purposes of this decision as the Co-claimant. There was no objection by other parties to his being designated a claimant.

I held a hearing on June 30, 2015, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant and Co-claimant appeared and represented themselves. The Respondent appeared and represented himself and his company.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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. 2014), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

### **ISSUES**

1. Is the Claimants' claim barred by the limitations period found in section 8-405(g) of the Business Regulation Article?
2. If the Claimants' claim is not barred by the limitations period, did the Claimants sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
3. If so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted exhibits on behalf of the Claimants as follows:

- |        |   |
|--------|---|
| CL. 1. | Claimants' summary  |
| CL. 2  | Claimants' summary/Attachment A   |
| CL.3   | Proposal from Donald Hoover dated April 1, 2012   |
| CL. 4  | Agreement/Proposal from the Respondent dated May 17, 2011                                     |
| CL. 5  | Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property |
| CL. 6  | Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property |

- CL. 7 Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property
- CL. 8 Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property
- CL. 9 Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property
- CL. 10 Email from Michelle Escobar to the Claimant dated October 6, 2014; and emails dated September 13, 2012, September 12, 2012, August 30, 2012, August 21, 2012, August 20, 2012 and August 14, 2012
- CL. 11 Home Depot Invoice dated December 14, 2014; proposal from Loews regarding removal of mold with photograph; Roof Masters invoice dated December 10, 2014; Roof Masters proposal dated October 30, 2014; photographs (4) of chimney flashing replacement;
- CL. 12 Email from Don Hoover to the Claimant dated April 1, 2012 with photograph of subject property

I admitted exhibits on behalf of the Contractor as follows:

- Contr. 1 Letter from the Respondent to HIC dated January 21, 2015; letter to Ben Curtis from the Respondent, undated; letter from Ben Curtis to the Claimant dated September 5, 2011; memo from Ben Curtis dated November 10, 2011; email from Peterson to HIC dated January 21, 2015
- Contr. 2 Letter from Peterson to HIC dated September 19, 2012
- Contr. 3 Photographs (14) of subject property
- Contr. 3A Photographs (2) of subject property
- Contr. 4 Email from Peterson to the Claimant dated June 16, 2014 in response to Claimant's email dated May 29, 2014; email from Peterson to the Claimant dated March 29, 2013; email from the Claimant to Peterson dated March 30, 2013
- Contr. 5 Series of documents listed as follows:
  - Respondent's Job Cost Worksheet dated May 13, 2011
  - Agreement/Proposal dated May 13, 2011
  - Invoice dated May 27, 2011
  - Allied Invoice dated May 27, 2011
  - Home Depot Invoice dated June 10, 2014
  - A.C.S. LLC Invoice dated May 14, 2014
  - All Type Remodeling Invoice dated May 27, 2011
  - Email record of Credit Card Transaction dated May 17, 2011
  - Email record of Credit Card Transaction dated June 27, 2014
  - Job Order dated May 18, 2011 from Peterson
  - List of job specifications and measurements
  - Email from the Respondent to Ben Curtis dated April 19, 2011
  - Email from Ben Curtis to Peterson dated May 18, 2011
  - Photographs (3) of subject property

Email from Ben Curtis to Peterson dated June 26, 2011  
 Letter from Ben Curtis to the Claimant dated September 5, 2011  
 Letter to Ben Curtis from the Claimant dated August 30, 2011  
 Letter from the Better Business Bureau (BBB) to Peterson dated November 29, 2011  
 Email from Peterson to David Dennis dated November 11, 2011  
 Email from Elise Bell to David Dennis dated October 11, 2011  
 Email from David Dennis to Peterson dated October 5, 2011  
 Letter from the Respondent to the Claimant dated June 27, 2011  
 Email from Peterson to Tracy Everett dated September 21, 2012, with responses  
 Email from the Claimant to Michelle Escobar dated August 14, 2012  
 Letter/proposal from Donald Hoover to the Claimant dated April 1, 2012  
 Email from Don Hoover to the Claimant dated April 1, 2012  
 Photographs (7) of subject property  
 Letter from the Respondent to HIC dated August 13, 2012  
 Email from Michelle Escobar to Elise Bell dated August 8, 2012  
 Letter from HIC to the Respondent dated June 26, 2012  
 Complaint Form dated May 21, 2012  
 Respondent Agreement/Proposal dated May 13, 2011  
 Letter from Elise Bell to the Claimant dated March 26, 2012  
 Letter from the Respondent to the Claimant dated September 5, 2011  
 Letter from BBB to the Respondent dated November 29, 2011  
 Letter from the Respondent dated November 10, 2011  
 Email from Peterson to David Dennis dated November 11, 2011  
 Email from Elise Bell to David Dennis dated October 11, 2012  
 Email from David Dennis to Peterson dated October 5, 2011  
 Photographs (3) of subject property

I admitted exhibits on behalf of the Fund as follows:

- Fund Ex. 1 OAH Notice of Hearing dated April 2, 2015
- Fund Ex. 2 HIC Hearing Order dated February 12, 2015
- Fund Ex. 3 DLLR ID Registration regarding the Respondent
- Fund Ex. 4 HIC Claim Form dated December 22, 2014
- Fund Ex. 5 Letter from DLLR to the Respondent dated January 7, 2015, regarding the complaint dated December 22, 2014

Testimony

The Claimant did not testify due to her first language being Arabic. The Co-claimant testified on their behalf.

Peterson, President of the Respondent, testified on its behalf.

There was no testimony presented on behalf of the Fund.

**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 contractor's license number 4679447.
2. On May 17, 2011, the Claimant and Respondent signed a contract which provided that the Respondent would do home improvement work on Claimant's home located at 18003 Ohara Circle, Olney, Maryland 20832. The Claimant lives with and shares the home with the Co-complainant.
3. On May 13, 2011, the Claimant met with the Respondent's salesman, Ben Curtis (Curtis).
4. The Claimant hired the Respondent to replace the existing roof on her townhome.
5. The scope of the roof work included a repair to the Claimant's chimney, only to re-secure loose vinyl siding panels on the chimney, by installing a new piece of siding J-Channel in a 10' area from the top of the chimney.
6. In addition, the Respondent agreed to replace the trim boards at the bottom of the chimney sealing the step flashing.
7. The step flashing is 2" above the roof deck and the trim boards cover the top of the step flashing preventing water intrusion around the roof and vertical transition.
8. The specific terms of the contract required the Respondent to do home improvement work as follows:

- Install perimeter protection, as needed to protect property and landscaping
- Tear off old shingles
- Remove existing cladding to wood deck as needed

Prep and re-nail all loose decking to provide a smooth substrate for roof installation  
Replace any bad wood decking at an extra cost of \$75.00 per sheet of plywood  
Install fiberglass reinforced what?  
Install GAF, Sovereign, Golden Cedar shingles  
Install ice and water shield in the gutter lines and valleys  
Install drip edge at all eaves/rakes, white in color  
Install Ridge Vent  
Install Pipe Collars and Seal  
Install new valley flashing with ice/water shield underlayment and closed valley construction  
Install step-flash walls as needed to achieve a watertight seal  
Install apron flashing at walls to achieve tight seal  
Re-flash chimney as needed to achieve a watertight seal  
Chimney crown & seal masonry  
Clean and re-secure gutters as needed to achieve a watertight seal  
Clean and haul away all job related debris  
Replace J-Trim on chimney; re-secure siding on chimney

9. The contract price included four sheets of replacement plywood decking. Any additional plywood decking to be replaced was charged at \$75.00 per sheet.

10. The total agreed upon contract price was \$3,995.00. The Claimant paid the Respondent the sum of \$1,331.00 from her VISA credit card account on or about May 17, 2011. The Balance due was \$2,664.00.

11. The scope of the work was to be completed by May 27, 2011.

12. The Respondent completed the work on May 26, 2011.

13. The first rain of June 2011 resulted in a rain water leak where the roof met the chimney, located at the corner of the master bedroom. There was a steady stream of water into the bedroom when it rained.

14. The Claimants refused to pay the remaining amount due for the work that was completed on May 26, 2011. They demanded that the Respondent repair the bottom corner trim boards of the chimney. Such a repair was not within the scope of the May 17, 2011 contract.

15. The Respondent provided a price quote for the requested additional work.
16. The Claimants refused to pay for the contracted work completed or for the additional work requested.
17. On September 6, 2011, the Claimants' submitted a complaint against the Respondent to the Better Business Bureau (BBB ) of Metro Washington.
18. On October 3, 2011, BBB notified the Respondent of the complaint.
19. On October 11, 2011, and November 11, 2011, the Respondent emailed BBB and responded to the complaint.
20. November, 29, 2011, BBB closed the case because the Complainants did not respond to its requests to comment on the response from the Respondent.
21. On May 29, 2012, the Complainant filed a complaint with DLLR against the Respondent and requested participation in mediation. The complaint stated that the Respondent did not complete the work. The Complaint also provided the date work began, (May 2011) and the last date of work performed (May 2011).
22. The DLLR complaint form provided a note to advise that the Complainants may be eligible to file a claim against the Fund. The note further advised that the separate claim form is only available after the filing of the May 29, 2012 complaint form and the DLLR completes its investigation of the allegations contained within the DLLR complaint.
23. On June 26, 2012, DLLR sent a copy of the complaint to the Respondent.
24. On June 27, 2012, the Respondent sent the Claimants the manufacturer's ten year roof warranty.
25. On July 18, 2012, the Respondent emailed to Michelle Escobar (Escobar), an investigator with HIC, a response to the DLLR complaint.

26. On August 8, 2012, Escobar emailed the Respondent to seek a response to the complaint directly from Peterson.

27. On August 13, 2012, the Respondent mailed a letter to DLLR in response to the DLLR complaint.

28. On August 14, 2012, the Co-complainant emailed Escobar to respond to the Respondent's August 13<sup>th</sup> email.

29. On August 21, 2012, Escobar advised the Co-claimant that she would schedule a site visit with the parties; and, if the Respondent determined that a site visit was not appropriate, Escobar would determine whether the Complainants' needed to file a claim against the Fund.

30. On August 30, 2012, Escobar scheduled the site visit for September 5, 2012.

31. On September 5, 2012, the Respondent and the Complainants met at the subject property where the Respondent agreed to do additional work outside the scope of the original agreement and as an accommodation for purposes of receiving payment due from the original contract. The additional work was re-securing loose siding panels and installing a J-Channel on the one side of the chimney in a 10' area.

32. On September 7, 2012, the Respondent and its workers returned to the property, but the Complainants were not at the property to receive them. No work was performed.

33. On September 10, 2012, the site visit occurred according to the Co-claimant's email to Escobar dated September 12, 2012. Escobar did not attend the site visit.

34. As a further accommodation to the Claimants, the Respondent added a foam sealant to the base of the chimney trim to cover the small amount of rot that was present on the wood chimney trim.



35. The foam accommodation was done at no additional charge to the Claimants.

36. The Respondent advised the Claimants to hire a handyman or painter to trim and paint the foam after it hardened.

37. On September 13, 2012, Escobar closed her case file and advised the Co-complainant by email to keep her informed.

38. On September 21, 2012, the Co-complainant emailed the Respondent to advise he noticed some dampness in the ceiling where there was a prior leak before September 10, 2012.

39. The Co-complainant emailed Escobar on October 6, 2014 to advise that the property continued to have major water leakage due to the home improvement

40. Escobar responded to the email on October 6, 2014 and attached a HIC claim form. She advised the Co-claimant that he could still file a claim if he was still experiencing leaking; and further advised to let her know if there were questions about the claim form.

41. On October 30, 2014, the Complainant contracted with Roof Masters to make necessary repairs to an exposed attic area as well as replacing chimney flashing. The cost of the work was \$829.00.

42. The Complainants filed a complaint with the Fund on December 22, 2014.

## DISCUSSION

### Legal Framework

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 actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement

contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2010 & Supp. 2014). Under this statutory scheme, licensed contractors are assessed fees which subsidize the Fund. Homeowners who sustain losses by the acts or omissions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor 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) and (5) (Supp. 2014). 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. 2014). When the Fund pays money to a homeowner as a result of an actual loss caused by a licensed 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 reimburses the Fund in full with annual interest as set by law. 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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). “The Fund may only compensate [claimants] for actual losses 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).

In this case, the Claimants are not eligible for compensation because they filed their claim beyond the three-year limitations period for filing claims. Md. Code Ann., Bus. Reg. § 8-405(g) (2015). Even if the Claimants had filed their claim within the limitations period, they did not prove that the Respondent committed any act or omission that resulted in an actual loss. I have set forth the bases for my conclusions in detail below.

Statute of Limitations

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants. There are no *prima facie* statutory impediments barring the Claimants from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

As touched on briefly, above, a significant obstacle stands in the way of the Claimants' recovering compensation from the Fund. Section 8-405(g) of the Business Regulation Article states, "A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." The Claimants clearly discovered leakage to their roof during the first rain of June, 2011, which was after the Respondent completed the contracted work on their home on May 26, 2011. Despite their belief that the rain water leakage of June 2011 was caused by an inadequate home improvement by the Respondent they did not file a claim against the Fund for the work completed on May 26, 2011, until December 22, 2014, more than three years later.

The Claimants testified and argued that on May 29, 2012, they filed a complaint with DLLR against the Respondent and requested participation in mediation. The Complaint further stated that the Respondent did not complete the work; that the work began in May 2011 and the

last day the work performed was in May 2011. Escobar was the investigator assigned to the complaint. The Co-complainant testified that they did not file a complaint with the Fund until December 22, 2014, because Escobar led them to believe DLLR was working to resolve the dispute and they were waiting for the Respondent to comply with their warranty claim.

The fund did not file a written motion to dismiss the complaint for late filing pursuant to Bus. Reg. §§ 8-405(f)(1) and (2). It raised the issue in its closing argument at the hearing and did not waive the limitation period.

Although Maryland's appellate courts have not directly addressed the nature of the filing deadlines in an administrative scheme, its opinions suggest that a filing deadline stipulated in a statute, such as section 8-405(g) of the Business Regulation Article, would generally be construed as a condition precedent to the right of action. *See, e.g., Higginbotham v. Pub. Serv. Comm'n*, 412 Md. 112, 138 (2009) (Harrell, J., concurring and dissenting) (“[W]here a statute containing a limitation period creates both the right and the remedy, the limitation period constitutes a condition precedent to maintaining suit, not merely a statute of limitations subject to waiver if not raised by the defendant as an affirmative defense.”). A condition precedent operates like a jurisdictional bar and is non-waivable and non-tollable and can be raised at any time. *See, e.g., Kearney v. Berger*, 416 Md. 628, 658-59 (2010) (“[A] condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied.” (citations omitted)). A statute of limitations, on the other hand, is subject to waiver by failure of a respondent to raise the defense in a proper manner, but it is not subject to discretionary extension. *S.B. v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 195 Md. App. 287, 307-08 (2010). Equitable exceptions such as tolling and estoppel may

also be available under a statute of limitations, but these exceptions are narrow. *See, e.g., Elat v. Ngoubene*, 993 F. Supp. 2d 497, 537-38 (D. Md. 2014).

The Court of Appeals' opinion in *State v. Sharafeldin*, 382 Md. 129 (2004), is a key opinion on the distinction between a statute of limitations and a condition precedent. The Court of Appeals addressed whether a statutory timeframe for breach of contract claims against the State "constitute[d] a condition to the waiver of sovereign immunity and thus to the right of action itself against the State or [was], instead, merely a statute of limitations." *Id.* at 132. The statutory provision provided that "[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year . . ." *Id.* (emphasis added). The Court held that the filing deadline was not a statute of limitations but a condition to the action itself and that "the waiver of the State's immunity vanishes at the end of the one-year period." *Id.* at 148. In so holding, the Court reviewed the statute's construction for its legislative intent. The Court stated:

[I]n attempting to divine legislative intent, we look first to the words of the statute, but if the true legislative intent cannot readily be determined from the statutory language alone, we look to other *indicia* of the intent, including the title to the bill, the structure of the statute, the inter-relationship of its various provisions, its legislative history, its general purpose, and the relative rationality and legal effect of various competing constructions.

*Id.* at 138 (internal quotation marks omitted and emphasis added).

The Court was concerned about construing the deadline as a "mere statute of limitations, waivable at will by State agencies or their respective attorneys," as "limitations is an affirmative defense that can be waived and that *is* waived unless raised in the defendant's answer." *Id.* at 140-41. The Court highlighted the use of the term "barred" in the applicable statute and stated that "traditional statutes of limitations . . . normally state only that an action 'shall be filed within' the allowable period." *Id.* at 140. The Court explained that when "a limitation period is stipulated in a statute *creating a cause of action* it is not to be considered as an ordinary statute

of limitations, but is to be considered as a limitation upon the right as well as the remedy” and held that the time limitation in the statute was a condition to the waiver of immunity and was not subject to waiver or tolling. *Id.* at 147-48 (internal quotation marks omitted and emphasis added).

The plain language of the Fund’s limitation period is more aligned with the general statute of limitations in the Court and Judicial Proceedings Article rather than the condition precedent in *Sharafeldin*. In *Sharafeldin*, the applicable limitations provision provided that “[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year.” *Id.* at 132 (emphasis added). The Fund’s limitation provision states that “[a] *claim shall be brought against the Fund within 3 years* after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann., Bus. Reg. § 8-405(g) (2015) (emphasis added). Section 5-101 of the Courts and Judicial Proceedings Article states that “[a] civil action at law shall be filed *within three years from the date it accrues* unless another provision of the Code provides a different period of time within which an action shall be commenced.” Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2013) (emphasis added). The statutory language in section 8-405(g) thus resembles that of the general statute of limitations in section 5-101. Moreover, although the limitations period is stipulated in the statute, the Act “facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries” rather than creates a new cause of action. *Landsman*, 154 Md. App. at 251-52; *see also State ex rel. Stasciewicz v. Parks*, 148 Md. 477 (1925) (“In most jurisdictions the courts have held that all the provisions of these statutes [that create a new cause of action], including that fixing the time within which the action must be brought, are essential to the maintenance of the suit.”). The

plain language of the statute and its legislative history indicate that the limitations period is a more flexible statute of limitations.<sup>2</sup>

Here, the Complainants filed their complaint with the Fund more than three years after they discovered a rainwater leak that they concluded was due to the Respondent's performance of the contract. On August 21, 2012, Escobar did advise the Claimants that she would advise them of a need to file a claim with the Fund if necessary. The Complainants chose to continue working with the Respondent. Escobar closed her case file on September 13, 2012, without making a recommendation one way or the other whether a claim against the Fund would be necessary. From that point the Claimants still had almost twenty months to make a timely claim against the Fund – from September 2012 to May 2014 - but did not do so.

It was not until October 6, 2014 that the Co-complainant reestablished communications with Escobar, a three year period after the roof leakage of June 2011. Although Escobar then emailed a claim form to the Co-complainant on October 6, 2014, the limitations period had already expired. The Fund complaint filed by the Complainants on December 22, 2014, was late.

#### Amending the Complaint

The Claimants' original claim sought \$2,535.00. At the hearing, they amended the claim to the sum of \$3,148.00. \$829.00 was attributed to money paid to Roof Masters for its repairs. The sum of \$2,319.00 was attributed to purchasing supplies from Home Depot on December 14, 2014 to replace drywall and insulation in the master bedroom.. There was no evidence presented to identify who performed the drywall/insulation work.

---

<sup>2</sup> Even if section 8-405(g) were interpreted as a condition precedent, this action would still be barred for the same reasons as those relied on in the limitations analysis.

COMAR 09.08.03.02 regulates amending claims before the commission, as follows:

- C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:
- (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
  - (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

COMAR 09.08.03.02.

The amendment amounts to a difference of \$613.00 more than the original claim. The Fund objected to the amendment and argued that the original claim was based only on a problem with a leak at the chimney and was not based on insulation replacement. By the time the claim was filed on December 22, 2014, the Complainants' could have determined the full extent of the damage they claim was due to the Respondent's inadequate work pursuant to the May 13, 2011 agreement. I agree with the Fund. Adding an additional cost of repair work unknown to the Respondent is prejudicial. Therefore, the request to amend claim to add \$2,319.00 for repair/installation of insulation/drywall, is denied.

*The Merits of the Case*

Even assuming, for the sake of argument, that the Claimants had timely filed their claim, they still did not prove entitlement to reimbursement from the Fund. This is because the Claimants never demonstrated an inadequate home improvement by the Respondent.

A rain water leak from the roof area and chimney is at the crux of this matter. Although the Complainants contracted in May 2011 to have the Respondent replace the roof on their property, the reason for roof replacement was not due to it leaking. According to the Complainants', the roof did not leak until June 2011, after the installation of the new roof.



The Respondent testified that the probable cause of the leak after it installed the new roof (shingles and plywood) and made a repair to the chimney, (securing loose panels on the chimney and installing a new piece of siding J-channel<sup>3</sup> in a 10' area at the top), was the condition of the siding on the chimney and surrounding area. According to the Respondent, water will blow behind the siding on the chimney and will get behind the roof step flashing. The Respondent gave his opinion that all of the siding on the property was in need of replacing or needing additional repairs due to age and weather. The Respondent maintains that the rain water leakage is not due to a roofing issue but is due to wear and tear of the siding. Respondent further testified that replacement or repair of the siding near, on or around the chimney was not a part of the scope of work in the original agreement. I found the Respondent credible in his testimony and was persuaded by his opinion that there might be other causes for the rain water leak.

The Complainants have the burden of proof. The evidence presented by the Complainants did not tend to prove, by a preponderance of the evidence, that the source of the rainwater leak was due to the Respondent inadequately installing the roof in May 2011. The evidence showed that the leak could have been due to a number of reasons: improper nailing of roofing nails; deterioration of the vinyl siding on and around the chimney area; or, failure of the flashing around the chimney. Although the Co-complainant testified that rain water leakage did not occur until after the May 2011 roof installation, the evidence is not sufficient to show such leaking was due to the roof replacement by the Respondent.

On October 30, 2014, the Complainants contracted with Roof Masters, where the scope of their work included the following:

Block off exposed hole in attic with plywood from inside the attic

---

<sup>3</sup> No one defined a J-Channel. From the testimony and photographs, it appears to be on this property, a vinyl piece running along the sides of the chimney which was covered with vinyl siding and anchored with wood trim.

Remove the existing shingles down to the wood decking  
from around the chimney located on the rear of the roof  
Remove existing step flashing from around the chimney  
Inspect the wood decking around the chimney for any signs  
of rot or deterioration  
Remove siding panels from around the chimney to install  
ice/water shield to sidewall  
Install new winter Guard/Ice/Water Shield to the roof deck  
around the chimney as required to prevent any leaks from  
wind driven rain or ice dams  
Install new felt paper  
Install new chimney step flashing  
Install new shingles to match existing style and color  
Paint new chimney flashing to match the color of the roof  
Clean up and haul away any and all job related debris

(Claimant Ex. 11.)<sup>4</sup>

Roof Masters work corrected the leaking problem in 2014. It did so by replacing the siding on the chimney in an area which was further up and away from the roof itself. This work was beyond the scope of the Respondent's contract with the Complainants. It was also consistent with the Respondent's opinion of why it believed the rain water was entering the home.

The Claimants contend they are entitled to reimbursement from the Fund based on the Respondent's inadequate home improvement which, according to them, caused rain water leakage into their home. The Respondent disputes that its work was the cause of rainwater leakage. The Fund argues that there is insufficient evidence to show that the Respondent's work caused the rain water leakage and that the Claimants have not sustained an actual loss compensable by the Fund.

---

<sup>4</sup> The Contract with the Respondent did provide for re-flashing of the chimney as needed to achieve a watertight seal and to replace the J-Trim on the chimney and re-secure the siding on the chimney. But that work was near the base of the chimney where it meets the roof.

**PROPOSED ORDER**

***WHEREFORE, this 20th day of November, 2015, 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.***

***Jeffrey Ross***

***Jeffrey Ross  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**

I agree with the Fund. The evidence submitted by the Claimants does not prove by a preponderance that the Respondent's work in May of 2011 to replace the roof of the townhome caused the rain water leaks that the Complainants' testified began in June 2011. The evidence presented by the Respondent as well as the contract with Roof Masters tend to show that there were other reasons that may have caused the rain water leakage; and, the fact that the leaks stopped in 2014 due to the work of Roof Masters on the chimney that was not within the scope of the Respondent's contract, confirms the other possibility for the leakage.

Therefore, for the reasons noted, the Claimants' Guaranty Fund claim is denied.

**PROPOSED CONCLUSIONS OF LAW**

I conclude as a matter of law that the Claimants claim is time barred. Md. Code Ann., Bus. Reg., § 8-405(g) (2015). Further, even if the Claimant's claim was not time barred, the Claimants did not prove they sustained an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent because the Claimant did not establish that the Respondent's installation of the roof in May 2011 resulted in rain water leaks to the townhome. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a) (2015); COMAR 09.08.03.03B(2).

**RECOMMENDED ORDER**

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

**ORDER** that the Claimant's Claim of an actual loss be **DENIED**.

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

**Signature on File**

September 28, 2015  
Date Decision Issued

Wonn T. Henderson, Jr.  
Administrative Law Judge

JTH/cj  
#158384

**Signature on File**