IN THE MATTER OF THE CLAIM	*	**BEFORE TARA K. LEHNER,**
OF HERBERT AND VIVIENNE	*	**AN ADMINISTRATIVE LAW JUDGE**
CAPPEL,	*	**OF THE MARYLAND OFFICE**
CLAIMANTS,	*	**OF ADMINISTRATIVE HEARINGS**
AGAINST THE MARYLAND HOME	*	**OAH No.: DLR-HIC-02-15-15436**
IMPROVEMENT GUARANTY FUND	*	**MHIC No.: 15 (90) 373**
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF HERNAN BARON,	*	
T/A SCORPION GROUP, LLC,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 24, 2015, Herbert and Vivienne Cappel, filed a filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of alleged actual losses suffered as a result of a home improvement contract with Hernan Baron, trading as Scorpion Group, LLC (Respondent).[1]

[1] The Claim was originally filed by Mr. Cappel. At the hearing, I granted Mr. Cappel's request that the Claim be amended to include Mrs. Cappel. There was no objection by any party to the amendment.

On September 4, 2015, I held a hearing at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Mrs. Cappel represented the Claimants. The Respondent represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (the Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimants 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimants:

1. Contract with handwritten notes by Claimants
2. Contract with handwritten notes by Claimants and Respondent
3. Contract with Bishops Home Improvement, Inc. with proof of payment
4. Invoice of Unique Enterprises with proof of payment
5. Estimate by AJ Surman Construction
6. Check Nos. 2601 and 2604
7. Photographs A-R

8. Contract, original, with handwritten notes by Claimants

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits offered by the Fund:

1. Notice of Hearing
2. Hearing Order
3. Licensing History
4. Home Improvement Claim Form
5. Letter from the HIC to the Respondent
6. Photograph

Testimony

Mr. and Mrs. Cappel testified for the Claimants.

The Respondent testified for himself.

The Fund did not present witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this hearing, the MHIC licensed the Respondent as a home improvement contractor, license number 127045. The current license, or registration, is set to expire on March 13, 2019.
2. Neither of the Claimants is: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.
3. Neither of the Claimants owns more than three residences or dwelling places.

4. On or about April 9, 2012, Mr. Cappel entered into a contract (Contract) with the Respondent to perform home improvement work at the Claimants' primary residence, 17000 Hersperger Lane, Poolesville, Maryland.
5. The Contract work included replacing the railing on a portico over the Claimants' front door (Portico) using "PVC white" material, painting the ceiling of the Portico, and installing two shutters. The Contract price was $1,450.00.
6. On or after June 24, 2014, the Claimants and the Respondent orally agreed that the Respondent would perform some roof work on the Portico. The Claimants agreed to pay $480.00 for this additional work. The material to be used for the roof work on the Portico was never agreed to by the parties.
7. The Claimants paid the Respondent in two payments: $800.00 and $1,130.00.
8. When the Respondent performed the railing work on the Portico, the Respondent used white plastic material to make the handrails and posts and roof paper to complete the Portico roof repair.
9. In September 2014, the Claimants had Unique Enterprises, Inc. (Unique), perform repairs to the roof of the Portico. The repairs included removing the existing handrails and posts, tearing off the existing roof, installing new plywood that created a one-inch slope, installing a rubber mat, and reinstalling the handrails and posts. The Claimants paid Unique $1,350.00 for this work. The installation of new plywood on the Portico roof to create a one-inch slope, and the installation of a rubber mat on the Portico roof, was not work that the Respondent performed for the Claimants.
10. On February 24, 2015, the Claimants filed the Claim for $1,930.00 with the Fund.

11. The Claimants have not taken any legal action to recover monies from the Respondent other than the instant Claim.

DISCUSSION

An owner bears the burden of proof with regard to a claim against the Fund by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2015);[2] COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor . . . ." Md. Code Ann., Bus. Reg. § 8-405(a); *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."). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. However, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Additionally, a claimant may not recover from the Fund if he or she has unreasonably rejected good faith efforts on the part of a respondent to resolve the matter. *Id.* at § 8-405(d).

In addition, an owner must prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) any remedial work was done by licensed

[2] All citations to the Business Regulations Article are to the 2015 replacement volume.

contractors; (f) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (g) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (h) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Respondent was a licensed home improvement contractor, and that the Respondent entered into a home improvement contract with the Claimants for repairs to an existing Portico at their primary residence in Maryland. In addition, the preponderance of the evidence is that the Claimants owned fewer than three dwelling places, and, that at all relevant times, the Claimants were not employees, officers or partners of the Respondent, nor immediate relatives of the Respondent, his spouse or any of his partners, officers or employees. The evidence also shows that the Claimants did not recover for the Respondent's acts or omissions from any other source, and there are no actions or claims pending in any court of competent jurisdiction. Finally, it is undisputed that there is not an arbitration clause in the Contract and that the Claimants filed their claim within three years of the date of the Contract.

The question of whether the Respondent committed an unworkmanlike, inadequate, or incomplete home improvement, and if so, the extent of the actual loss suffered by the Claimants, is disputed by the parties. The Claimants make two separate assertions: 1. the Respondent's work with regard to the replacement of pillars on the Portico was incomplete, unworkmanlike and/or inadequate in that the pillars were not solid pieces of white plastic or "PVC"; and 2. the Respondent's work with regard to the roof of the Portico was incomplete, unworkmanlike and

inadequate, in that the Respondent used the incorrect material when repairing the roof, and that when he installed the incorrect material, he did so in a manner that caused water leaks. For the reasons outlined below, I find that the Claimants have not proven that there was any incomplete work by the Respondent. I also find that with regard to the pillars, the Claimants have not proven that the Respondent's work was inadequate or unworkmanlike. Finally, as to the Portico roof, I find that the Claimants have proven that the Respondent's work was inadequate and unworkmanlike, and I recommend that the Fund make an award to the Claimants for their actual loss therefrom.

Pillars

The Claimants assert that the Respondent's work with regard to the pillars on the Portico was incomplete, unworkmanlike and/or inadequate. They allege that instead of installing "molded" prefabricated pillars that are a solid piece with four sides, the Respondent used 1x6 sheets of material to build three-sided pillars.

Based on the evidence in this case, I do not find that the Respondent's work on the pillars was incomplete. In order to prove that the work was incomplete, I must find that the Respondent failed to complete work as delineated by the Contract. The Contract in this case does not specify whether the pillars should be pre-fabricated solid plastic, or whether the Respondent was permitted to build the pillars using 1x6 sheets of material. The only limitation contained within the Contract is that the "handrails" should be "PVC white." The Claimants agree that the Respondent used this type of material when he built the pillars.

With regard to whether the pillars were inadequate or unworkmanlike, I also find that the Claimants have not met their burden. In order to demonstrate that the Respondent's work is inadequate or unworkmanlike, the Claimants must demonstrate that the Respondent's work did

not comply with construction industry standards. In some instances, where there is an obvious mistake or deviation from what is expected, and where a trier of fact can easily recognize that such deviation varies from the applicable industry standard, a trier of fact may independently conclude that a contractor's work is inadequate. *See Schultz v. Bank of America, N.A.*, 413 Md. 15, 29 (2010); *Crockett v. Crothers*, 264 Md. 222, 224 (1972). However, when professional standards are "beyond the ken of the average layman," then expert's testimony is necessary. *Bean v. Dept. of Health*, 406 Md. 419, 432 (2008); *see also Schultz*, 413 Md. at 27 (expert testimony was necessary to explain to the trier of fact the industry standard when it involves something that the trier of fact cannot be expected to appreciate); *Ragland v. Maryland*, 385 Md. 706, 717 (2005) (expert testimony is required if the subject matter of the testimony is based on specialized knowledge, skill, experience, training or education).

Under the facts of this case, I conclude that expert testimony is necessary to establish the construction standard for pillars, and whether the Respondent performed work that was outside of that standard. I do not possess the knowledge or training to conclude whether it was unworkmanlike or inadequate work for the Respondent to fabricate a pillar rather than install a prefabricated one. In this case, the Claimants presented no such evidence. The only evidence presented by the Claimants was their testimony that an employee from another contractor, Unique, informed them that the pillars should have been molded plastic. I have no knowledge of this individual's experience and training, thus I have no basis upon which to accept this unnamed individual's opinion.[3]

[3] Cl. Ex. 4 contains the statement: "Rail and posts were not molded. Posts were made out of 1x6 material." The invoice does not contain an opinion as to whether this violates industry standards, nor does it identify the writer's experience and training in this type of work.

Thus, because I find that the Claimants have not proven that the Respondent's work with regard to the pillars was incomplete, inadequate, or unworkmanlike, I do not find that the Claimants suffered an actual loss for this work.

Roof

The original Contract does not include Portico roof repair. Both parties agree that the roof repair discussions began after the Respondent began the contracted work. At some point the Respondent advised the Claimants that the roof needed to be repaired, and the parties enter into oral negotiations. The parties have different version of the content of those discussions.

Mr. Cappel testified that the Respondent came to him after the Respondent started to replace the Portico posts and handrails and advised Mr. Cappel that the current Portico roof had only 2-3 more years of life expectancy. Mr. Cappel testified that he understood that the Respondent then offered to do a complete roof repair for $480.00, using a "mat." On cross-examination, Mr. Cappel testified that he understood a "mat" to mean that the Respondent would replace the roof with the same material that already existed on the roof, e.g., a rubber mat; however, he also confirmed that the Respondent never showed him the material the Respondent intended to use on the roof. Mr. Cappel testified that he accepted the Respondent's offer, and orally agreed to pay the Respondent $480.00 to install a new roof mat. Mrs. Cappel then made hand written notations on their copy of the Contract reflecting Mr. Cappel's understanding of the oral agreement as told to her by Mr. Cappel.

The Respondent's recollection of the negotiations is quite different. He recalls telling the Claimants that the Portico roof needed to be repaired immediately. He testified that he knew the cost of repair was an issue for the Claimants so he told them that he could do a less expensive repair by placing roof paper over the existing rubber mat, and that this temporary repair would

add 2-3 more years of life to the existing roof. He stated that he advised them that he could replace the entire roof, but that it would be a much more expensive option (approximately $1,500.00). The Respondent recalls that the Claimants chose the less expensive short-term option of roof-paper only, and agreed to pay him $480.00 for the additional work. The Respondent similarly made hand-written notations to his copy of the Contract, stating that he would install "roof paper" to the roof for $480.00. He also testified that he showed Mr. Cappel the roof paper that he intended to use, and recalled that he explained to Mr. Cappel that the special roof paper he selected contains a very strong adhesive that he believed would attach well to the existing rubber mat.

The Claimants and the Respondent are each very emphatic that their understanding of the agreement was the final oral agreement; however, I do not find one party's version more credible than the others'. The parties' notations upon each of their copies of the Contract do not provide support for either party's position; their notes simply reflect their understanding of the alleged agreement. As often happens with oral negotiations, the parties never had a meeting of the minds as to a key term; in this case, the material to be used to repair the roof. Mr. Cappel understood the repair would be made with a rubber mat. The Respondent understood that he would use roof paper for the $480.00 repair.

As the Court of Appeals held in *Strickler Eng'g Corp. v. Seminar, Inc.*, 210 Md. 93, 101 (1956), in order to constitute a valid agreement, the parties must express themselves in such terms so that it can be ascertained to a reasonable degree of certainty what the agreement meant, and any vagueness which results in an inability to determine the full intention of the parties renders the contract void. *See also Quillen v. Kelley*, 216 Md. 396, 407 (1958). Thus, because

the parties did not agree as to a key term, I find that the parties never entered into a valid and enforceable agreement regarding the Portico roof.

In order for me to find that the Respondent's work on the roof was incomplete, I must first determine the scope of the work agreed to by the parties. Because there is no valid and enforceable agreement, specifically as it relates to the material that was to be used to repair the roof, I cannot find that the Respondent's placement of roof paper, instead of a rubber mat, on the Portico roof was incomplete work.

Additionally, because the Claimants did not present expert testimony, I cannot make a finding that the Respondent's decision to use roof paper on the Portico roof, as opposed to a rubber mat, was inadequate.

I do, however, find that the Respondent's installation of the roof paper was inadequate. The pictures offered by the Claimants into evidence clearly document that the Respondent installed the roof paper in such a way that it buckled, causing seams to lift, and creating gaps. Additionally, the pictures document how the Respondent did not install the roof paper to the edges of the roof. Even a lay person can conclude from these pictures that roof paper laid in this manner would fail to meet its intended purpose of preventing water from seeping down into the Portico. The Respondent offered no evidence to counter the Claimants' convincing evidence that his work in installing the roof paper was inadequate and unworkmanlike.

Having found that the Respondent performed inadequate work, the Claimants are eligible for compensation from the Fund. When determining the amount of the award, I note that the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Thus, the Claimants may not

receive any compensation for the money they spent to repair the fascia that rotted as a result of the Respondent's inadequate installation of the roof paper.

The Claimants had the Portico roof repaired by Unique in September of 2014 for $1,350.00. However, the invoice from Unique that the Claimant offered into evidence demonstrates that the scope of work completed by Unique is significantly broader than the work completed by the Respondent. Not only did Unique use more expensive and higher quality materials to repair the roof (Unique installed a "one piece rubber mat" as opposed to the roof paper installed by the Respondent), Unique also installed new plywood to create a one inch slope to prevent standing water. The Respondent did not contract to perform this task, nor did he perform it.

The Claimants did not present any evidence regarding what it would cost them to repair the Respondent's inadequate work using the same or similar materials with a similar scope of work. Therefore, I find that COMAR 09.08.03.03B(3)(c) is not an appropriate measurement.[4]

Instead, I find that a slight modification to the formula in COMAR 09.08.03.03B(3)(b) is an appropriate measurement to determine the amount of actual loss in this case:

> If the contractor completed inadequate work and the claimant is not soliciting another contractor to repair the work completed inadequately by the contractor, 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.[5]

---

[4] 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.

[5] COMAR 09.08.03.03B(3)(b) states: "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."

There is no value to the work the Respondent provided to the Claimants. The pictures document that the roof paper, as installed by the Respondent, was insufficient to meet its intended purpose. Additionally, the roof paper has deteriorated to a point where is clearly has no value for future use.

Thus, the formula for the Portico roof repair is as follows:

Amount paid to Respondent:	$480.00
Minus value of materials and services provided by Respondent:	$0.00
Award:	$480.00

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of $20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405 (e)(1), (5). The appropriate award is $480.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $480.00 as a result of the Respondent's acts and 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 award the Claimant $480.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed

under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;[6] and

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

Signature on File

October 27, 2015
Date Decision Issued

Tara K. Lehner (APEL)
Administrative Law Judge

TKL/cj
#156549

[6] *See* Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of December, 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.

I. Jean White

I. Jean White
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION