IN THE MATTER OF THE CLAIM	*	**BEFORE STEVEN V. ADLER,**
OF JOHN AND BERNICE WEEKS,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANTS	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF GARY BULLARD	*	
T/A GARY BULLARD CONSTRUCTION	*	**OAH No.: DLR-HIC-02-15-27351**
COMPANY,	*	**MHIC No.: 15 (90) 632**
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 March 23, 2015, John and Bernice Weeks (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $3,951.00[1] in alleged

[1] At the hearing, the Claimants' stated that the actual losses they suffered were $4,900.00 and indicated they wished to amend the Claim amount to reflect this sum. Code of Maryland Regulations (COMAR) 09.08.03.02C ("[o]nce 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) the 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) Claimants' proposed amendment would not prejudice the contractor whose conduct gave rise to the claim."); *compare* C Ex. 12 (Tyler Building Company's proposal in the sum of $3,981.00), *with* C Ex. 24 (Jato Construction's proposal in the sum of $4,645.00). Here, I find the Claimants knew or reasonably could have ascertained the facts upon which the proposed amendment is based—the alleged acts and omissions of the contractor described in C Ex. 24—at the time the claim was filed. Moreover, I find it would be prejudicial to the contractor to permit the amended claim because the contractor did not have the opportunity to prepare to answer a higher sum of damages based upon an alleged defect in his work not disclosed to him until the hearing. Therefore, pursuant to the controlling regulations, assuming for the sake of argument, I, and not solely the MHIC, have the power to grant an amendment to a claim decline to do so here. COMAR 09.08.03.02C.

actual losses suffered as a result of a home improvement contract the Claimants entered into with Gary Bullard, trading as Gary Bullard Construction Company (Respondent). On August 6, 2015, the MHIC issued a Hearing Order, and on August 13, 2015, transmitted the case to the Office of Administrative Hearings (OAH) for a hearing on the merits.

Accordingly, I held a hearing on November 18, 2015, December 21, 2015, and February 3, 2016[2] at the OAH in Salisbury, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015); COMAR 09.01.03.05A. The Claimants represented themselves. The Respondent represented himself. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Also present but not participating in the proceeding was Robert B. Taylor, Esquire, of Adkins, Potts, and Smethurst, LLP, counsel for Salisbury Neighborhood Housing Services, Inc. (SNHS).

As a preliminary matter, the Respondent made a Motion to Dismiss the Claim (Motion). R Ex. 1. I permitted argument from the parties and considered the Motion. However, pursuant to the controlling regulations governing this proceeding "[a] motion to dismiss or any other dispositive motion may not be granted by the [administrative law judge] without the concurrence of all parties." COMAR 09.01.03.05B. The Claimants and the Fund did not concur. I initially reserved ruling on the Motion in order to review the controlling regulations cited above, and hereby deny the Motion. *Id.*

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.

[2] The third day of hearings was originally scheduled for December 30, 2015, but postponed to February 3, 2016 at the request of the Claimants, due to ill health and the sudden death of an immediate family member.

ISSUES

1. Did the Claimants sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

C Ex. 1 - Home Inspection Report by Brumbley Property Inspections, March 7, 2014
C Ex. 2 - Proposal from the Respondent, revised August 1, 2014
C Ex. 3 - Email chain, ranging in dates from July 30 to July 31, 2014
C Ex. 4 - Final Inspection Report by Brumbley Property Inspections, September 12, 2014
C Ex. 5 - Letter to Alfred Brumbley, September 2014
C Ex. 6 - Letter from Silver Chase Community Association, September 29, 2014
C Ex. 7 - Letter from the Respondent to the Spring Chase HOA, replying to letter, September 29, 2014
C Ex. 8 - Letter to the Respondent, November 16, 2014
C Ex. 9 - Letter from Caldwell & Whitehead, November 10, 2014
C Ex. 10 - Letter to Caldwell & Whitehead, November 13, 2014
C Ex. 11 - Letter to the Thomas Marr, Investigator, MHIC, undated, replying to letter of January 22, 2015
C Ex. 12 - Proposal from Tyler Building Company, February 6, 2015
C Ex. 13 - Email, November 13, 2014
C Ex. 14 - Excerpt from a letter by the Respondent, undated
C Ex. 15 - Photo, undated
C Ex. 16 - Photo, undated
C Ex. 17 - Two photos, undated
C Ex. 18 - Two photos,[3] undated
C Ex. 19 - Photo, undated
C Ex. 19A - Photo, undated
C Ex. 20 - Photo, undated
C Ex. 21 - Invoice from the Respondent, September 18, 2014
C Ex. 22 - Email, September 19, 2014
C Ex. 23 - Email, October 5, 2014
C Ex. 24 - Printout from Lowe's order, undated, with attached emails
C Ex. 25 - Repair Report by Jato Construction, October 20, 2015
C Ex. 26 - Contract with Gutter Helmet, October 6, 2015
C Ex. 27 - Email chain, September 24, 2014
C Ex. 28 - Consent Order issued by the Maryland Commission of Real Estate Appraisers, *et al.*, Complaint No. 15-INSP-09, July 16, 2015

[3] There is a third picture that is cut off at the bottom of the page.

C Ex. 29 - Answer to the Respondent's letter to Joseph Tunney, MHIC, October 24, 2015
C Ex. 30 - Photo, undated
C Ex. 31 - Email chain, September 26, 2014

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

R Ex. 1 - Motion to Dismiss, with attachments, undated
R Ex. 2 - Collection of photos, September 22, 2014
R Ex. 3 - Sherwin-Williams paint invoice, August 20, 2014; with attachments
R Ex. 4 - SNHS Housing Rehabilitation Program Contract Agreement, August 8, 2014; with attachments
R Ex. 5 - Building Inspection Report Summary, undated, with attachments
R Ex. 6 - Email chain, ranging in dates from September 5 to September 19, 2014
R Ex. 7 - Email chain, ranging in dates from August 19 to October 2, 2014
R Ex. 8 - Email chain, ranging in dates from September 22 to October 15, 2014
R Ex. 9 - Letter from Center for Conflict Resolution, November 14, 2014, with attachments
R Ex. 10 - Email chain, ranging in dates from October 9, 2014 through October 14, 2015

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 - Notice of Hearing, September 24, 2015
GF Ex. 2 - Hearing Order, August 6, 2015
GF Ex. 3 - Licensing History of the Respondent, November 4, 2015
GF Ex. 4 - Home Improvement Claim Form, received March 23, 2015
GF Ex. 5 - Letter to the Respondent, March 30, 2015

The Claimants submitted and read into the record a written closing statement. Md. Code Ann., State Gov't § 10-218 (2014); COMAR 28.02.01.22.

There were no other exhibits offered or admitted.

Testimony

The Claimants testified on their own behalf.

The Respondent testified and presented the testimony of:

1. Cheryl Meadows, Executive Director, SNHS;

2. William T. Holland, Director, Department of Building, Permitting and Inspecting, City of Salisbury; and

3. Chad Goblinger, City Building Inspector, Department of Building, Permitting and Inspecting, City of Salisbury.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor, under MHIC registration number 99107.

2. The subject property at 936 James Court in Salisbury, Maryland (Claimants' home) was built in 1990 and is owned by the Claimants. The roof is original to the Claimants' home and has not been replaced; the siding and deck are also of venerable years.

3. The Claimants' home is subject to the rules and regulations of a homeowner's association (Spring Chase HOA) that requires uniformity of, and conformity with, amongst other things, specific exterior paint colors. Sherwin-Williams maintains the Spring Chase HOA's permitted paint color for use on the exterior of the Claimants' home, Open Hearth.

4. On a date unknown, the Claimants received a block grant from SNHS in the sum of $9,990.00 to make improvements to their home. After issuance of the grant, a lien was placed on the Claimants' home in that sum. The lien amount is reduced by twenty percent each year until the lien is released after a five year period. If the Claimants' home is sold within that five year period, a *pro rata* share of any amount remaining would be due and payable. Assuming the Claimants retain ownership of the home, after a five-year period no monies would be owed to SNHS. As of the date of the hearing, the lien on the Claimants' home was in the amount of $7,990.00.

5. In July 2014, the Claimants contracted with Peninsula Roofing (Peninsula) to perform a roof replacement and other home improvements to their home for the sum of $9,990.00. However, SNHS determined that Peninsula did not timely obtain the necessary permits needed for the work and so the Claimants were required to look elsewhere for a different contractor to perform the work.

6. On July 31, 2014, the Respondent submitted a proposal for siding and roof repairs to the Claimants' home with an estimated cost of $12,390.00 (First Proposal). The contemplated siding repair involved the replacement of between approximately sixty to eighty clapboards.

7. The Claimants requested the work be performed within the grant amount and agreed to a reduction in the scope of work from the First Proposal in order to achieve this cost requirement. Specifically, the number of clapboards involved in the siding repair was reduced from approximately sixty to eighty to approximately thirty.[4]

8. On August 1, 2014, the Respondent submitted a proposal for siding and roof repairs to the Claimants' home with an estimated cost of $10,520.00, with five hundred dollars to be paid by Lois Whittaker, a neighbor of the Claimants, for work that would benefit her property (Second Proposal).

9. On August 8, 2014,[5] the Claimants accepted the Second Proposal without exception and entered into a contract (Contract) with the Respondent for the following home improvements:

> Siding
>
> Replace approximately thirty clapboards deteriorated with new Hardi Cedar mill clapboard siding at walls and chimney housing;
>
> Replace trim boards at chimney housing with PVC type trim boards; and
>
> Caulk and paint to match house.
>
> Roof
>
> Tear off existing single layer of shingles, flashings, and drip edge;
>
> Install new thirty year architectural shingles, titanium paper underlayment;
>
> New flashings and boots;
>
> Replace skylight with Velux fixed unit; and
>
> Install new ridge vent over house attic.

[4] A total of forty-four clapboards were actually replaced by the Respondent on the Claimants' home.
[5] The contract is dated August 8, 2014 and signed by SNHS on that date. The Claimants signed the contract on August 7, 2014 and the Respondent on August 12, 2014.

Deck

Water blast rear deck and railing and apply one coat of sealer.

10. Although the work agreed to under the Contract called for the replacement of trim boards at the chimney housing with PVC type trim boards, the Respondent utilized wood trim boards instead because the PVC type boards were not sufficiently thick. The Respondent did not discuss this with the Claimants or obtain their consent before making the change in materials.

11. In addition to the work provided for in the Contract, the Respondent also repaired a portion of a fence surrounding a propane deck in the yard of the Claimants' home and removed metal flashing from around the foundation of the Claimants' home.

12. The work began on the Claimants' home in mid-August 2014 and was substantially complete on September 12, 2014.

13. The final agreed-upon Contract price was $10,520.00, with $9,900.00 to be paid by the SNHS grant, five hundred dollars to be paid by Ms. Whittaker, and the remaining thirty dollars to be paid by the Claimants.

14. On September 12, 2014, Alfred L. Brumbley, SNHS's home inspector, approved the Respondent's work to the Claimants' home, finding all work agreed to under the Contract was performed completely and with no observable deficiencies. At the time of the inspection, Mr. Brumbley was not a licensed home inspector; his license lapsed on April 22, 2012 and was not renewed.

15. On September 19, 2014, the Claimants submitted a punch list to the Respondent and SNHS detailing the following items they considered performed in an inadequate, incomplete or unworkmanlike manner and desired the Respondent to cure: siding stain incongruous with the remainder of the exterior of the Claimants home, messy caulking, a cracked board under which the replaced garage lamp sat, mismatching deck staining, and dirt in the yard of the Claimants' home not leveled to grade.

16. On September 22, 2014, city building inspectors approved the Respondent's work to the Claimants' home, finding no violations of the city building code. Amongst other things, Mr. Goblinger, the assigned city building inspector, visually inspected the replacement roof to the Claimants' home and did not observe any missing shingles or anything else untoward. Mr. Goblinger did not ascend the roof in order to inspect it, as he is not permitted by City of Salisbury employee safety standards so to do.

17. On September 24, 2014, the Claimants added two new concerns to their list of the Respondent's inadequate work: a dented brass garage light and a dented or bent gutter guard. The Claimants' communicated these new concerns to Eileen Hughes, Loan Administrator at SNHS by email on the same date.

18. On or about October 1 or 2, 2014, the Respondent returned to the Claimants' home for the first time after substantial completion of the Contract on September 12, 2014, and for the final time, to install a new black plastic light fixture to replace the existing dented brass light fixture. The two lamps are not equivalent products. [6]

19. On October 2, 2014, SNHS released $7,700.00 of the Claimants' $9,990.00 grant to the Respondent and initially held back the remainder, in the hopes the Claimants and Respondent could resolve their dispute through the SNHS grievance process. The sum of $7,700.00 was selected by SNHS to be disbursed to the Respondent as it represented the cost of the roof replacement, which SNHS and the Respondent understood to be performed to the Claimants satisfaction. After consultation with counsel, SNHS determined that the entirety of the Contract was complete, any remaining dispute was between the Claimants and the Respondent, and disbursed the remaining $2,290.00 to the Respondent on January 13, 2015.

[6] The Claimants original garage light was a steel fixture with a brass finish. *See* C Ex 25.

20. On February 6, 2015, Tyler Building Company (Tyler) provided a proposal to the Claimants to cure the deficiencies it observed in the Respondent's work under the Contract. The Tyler proposal included work not agreed to or provided for in the Contract, such as cleaning and performing repair work of the chimney pipe and installing new metal flashing removed by the Respondent. Tyler proposed to perform this remedial work for the sum of $3,981.00, in total. Tyler did not identify the cost associated with each line item. The Tyler proposal did not include any work to the roof replaced by the Respondent.

21. The Claimants began to have concerns about sagging in the roof replaced by the Respondent and expressed those concerns to city building inspectors in September or October 2015. Mr. Goblinger returned to the Claimants' home in approximately September or October 2015 after receipt of the Claimants' complaints. Mr. Goblinger visually inspected the roof both from the exterior and from the interior of the Claimants' home and did not observe any sagging or dipping of the replacement roof or any other deficiency in the Respondent's work.

22. The Respondent was unaware of the Claimants' concerns regarding the sagging roof and it was not communicated to him through any quarter until November 18, 2015, the first day of proceedings.

23. On or about October 19, 2015, Mr. Holland inspected the roof of the Claimants' home from the street and did not observe any sagging of, or dips to, the roof. Mr. Holland did not ascend the roof in order to inspect it, as he is not permitted by City of Salisbury employee safety standards so to do.

24. On October 20, 2015, Jato Construction (Jato) submitted a proposal to the Claimants to cure the deficiencies it observed in the Respondent's work under the Contract. The Jato proposal included work not agreed to or provided for in the Contract, such as performing repair work of the chimney, installing new metal flashing removed by the Respondent, repairing the sag to the roof, and replacing roof shingles installed by the Respondent. Jato proposed to perform this remedial work for

the sum of $4,645.00, in total, specifically identifying replacement of the chimney cap and installation of two exterior garage lights at the cost of $445.00 and the remainder of the work at $4,200.00, yielding a total of $4,645.00.

25. As of the date of the hearing, the thirty dollars the Claimants agreed to pay the Respondent under the Contract remains outstanding.

26. The Respondent installed wooden trim boards at the chimney housing of the Claimants' home rather than the agreed upon PVC type boards and did not properly stain the replaced siding clapboards to match the Claimants' home, in contravention of the Contract. In the course of performing improvements to the Claimants' home pursuant to the Contract, the Respondent dented a gutter guard and brass garage lamp, replacing the latter with a non-equivalent item and not replacing the former, and partially removed metal flashing from the foundation leaving a jagged piece remaining. Finally, the Respondent improperly replaced a section of fencing around the propane deck in the yard of the Claimants' home.

27. The Claimants' actual loss is the original Contract price attributable to the Claimants ($10,020.00) minus the monies paid to the Respondent ($9,990.00) and the outstanding balance due on the Contract ($30.00) plus the monies reasonably necessary to remediate the Respondent's inadequate, incomplete, and unworkmanlike improvements to the Claimants' home, as follows: $50.00 (PVC type trim boards) + $240.00 (repair fence around propane deck) + $100.00 (remove remaining piece of metal flashing) + $145.00 (replacement gutter guard) + 129.98 (purchase and installation of a new brass garage light) + $350.00 (restain siding to uniformly match house) = $984.98.

DISCUSSION

Governing Law, Controlling Regulations and Burden of Proof

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) (2015). *See also*

COMAR 09.08.03.03B(2) ("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 (2015).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8–407(e)(1) (2015); COMAR 09.08.03.03(A)(3). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014).

To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 125 n.16 (2002); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I find that the Claimants have, in part, proven eligibility for reimbursement from the Fund.

Argument and Testimony of the Parties and Witnesses

The Claimants testified at length and with great passion regarding their dissatisfaction with the work performed by the Respondent and with the subsequent actions and decisions of SNHS, whom they feel was entirely unresponsive to their concerns, performed only a *pro forma* investigation of their complaints, and ultimately unfairly and unjustly sided with, and, at the hearing, supported the cause of the Respondent, because of personal animus against the Claimants.

The Claimants felt the Respondent, too, treated them cavalierly, dismissively, and with disdain. In support of their position, the Claimants cited to email correspondence in which they felt the Respondent was mocking their observation of *Yom Kippur*, a high holy day of the Jewish faith, had threated them with protracted and costly litigation and the placement of a mechanics lien on the Claimants' home that would bar alienation of the Claimants' home if they did not immediately tender

all sums provided for in the Contract, and had improperly disclosed information regarding the SNHS grant and the Claimants' finances to unrelated parties. C Exs. 10, 22 and 23; R Ex. 8.

The Claimants explained that Mr. Brumbley, the home inspector assigned by SNHS to provide a final inspection before disbursement of the grant monies to the Respondent, was not licensed to perform home inspections on March 7 or September 12, 2014, the dates of original and final inspection, respectively, but performed the inspections anyway. C Exs. 1, 4 and 28. This, the Claimants suggest, supports their position that SNHS did not meaningfully review the Respondent's work or perform an independent investigation into their complaints, but instead merely adopted the Respondent's position as its own, precipitously and without concerted thought. SNHS's use of a non-licensed inspector to approve the Respondent's work, the Claimants' argue is further support for their position that the Respondent's work was performed inadequately and improperly, and baselessly approved by SNHS.

As of the date of the hearing, the Claimants aver that the following items specified in the Contract, or if not specified, were performed by the Respondent incidental to the Contract, in an inadequate, incomplete or unworkmanlike manner: the installation of a replacement garage light, the staining of the deck, the color of the siding stain, the roof replacement, failing to repair or replace the dented gutter guard, removal of metal flashing around the concrete slab upon which the Claimants' home sits, caulking around the garage, levelled dirt at grade, and cleaning, repairing, and unsealing the chimney cap and pipe.

In support of their position, the Claimants offered their testimony, photographs of the property, and proposals for curative work submitted by Tyler and Jato. C Exs. 12 and 24.

The Respondent argued that he performed all of the improvements to the Claimants' home agreed to in the Contract in a complete and workmanlike fashion, and in support of his position offered his testimony, along with that of Ms. Meadows and Messrs. Holland and Goblinger as well as

photographs of the Claimants' home, and email correspondence exchanged between the Respondent and the Claimants.

The Respondent's position is essentially that the Claimants fervently strong reaction to their misperception of being ill-treated effectively stymied their own ability to, with minimal strife and cost, and in a non-adversarial fashion, cure the Respondent's work they found unsatisfactory. The Respondent argued that the Claimants sought from the outset to have other contractors, not the Respondent, provide estimates for and perform the curative work, and in contravention of the Contract, placed significant strictures on the Respondent's ability to access the Claimants' home. R Ex. 8; *compare* R Ex 4 (Contract provides that Respondent shall be given access to the Claimants' home during normal business hours, *with* C Ex. 31 (the Respondent may only return to the Claimants' home with the Claimants' express and explicit consent and only at agreed upon dates and times). Finally, the Respondent argued that the Claimants did not avail themselves of every avenue of dispute resolution available to them and instead used every opportunity available to them to baselessly disparage him and his work product.

The Respondent's witnesses testified, respectively, that they considered the work performed by the Respondent under the Contract to be complete, and in the case of Messrs. Holland and Goblinger, that the work performed under the Contract was visually inspected and met or exceeded the requirements of the city building code. Ms. Meadows, who has served as a staff member at SNHS for twenty-two years, seventeen of those as director, testified that SNHS had utilized the home inspection services of Mr. Brumbley for more than twenty years, without incident, and had no idea at the time they contracted for his services to inspect the Claimants' home that his licensure had lapsed.

The Respondent posited that the Claimants were engaging in an age-old game of artfully feigning dissatisfaction with complete and workmanlike home improvements in order to extort additional work from him at no cost in the guise of being merely curative or simply to avoid paying the remaining monies due under the Contract. C Ex. 29.

The Fund took no position on the Claim generally, with three notable exceptions, discussed more fully below.

Analysis

I. The Claim—Undisputed Facts and Facts at Issue

There is no dispute that the Respondent held a valid home improvement contractor's license in August through September 2014, and at all time relevant to this matter, when he entered into and performed the home improvement Contract at issue with the Claimants. Further, there is no dispute that the Claimants are the owners of the subject property in fee simple and that there is no procedural impediment barring them from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f) (2015).

What is highly disputed and very much at issue is whether the Respondent performed all the work agreed to in the Contract in an adequate, complete and workmanlike manner.

As discussed above, the Claimants aver that the following Contract items were inadequately performed or performed in an incomplete or unworkmanlike manner: the installation of a garage light, the staining of the deck, the color of the siding stain, the roof replacement, use of wood instead of PVC type trim boards at chimney housing, a bent or dented gutter guard, improper repair of a section of fence surrounding a propane tank in the yard of the Claimants' home, removal of metal flashing around the concrete slab upon which the Claimants' home sits, caulking around the garage, levelled dirt at grade, and cleaning, repairing, and unsealing the chimney cap and pipe.[7]

A. Garage Light Fixture

The Claimants provided credible and unrefuted testimony that that the lamp in question was not dented prior to the commencement of the Contract, and I accept this as fact, on the record before me. There is no dispute that the Respondent replaced the Claimants' dented brass garage light fixture with

[7] At the hearing, the Claimants stipulated that they were not pursuing issues related to caulking and levelled dirt at grade in their Claim nor are these issues before me to resolve.

a new black plastic garage light fixture, which is not an equivalent. While the record does not definitively establish that the fault for denting the existing garage light lies with the Respondent, there is no question that the Respondent replaced the dented light fixture without charging the Claimants, from which I reasonably infer he accepted responsibility for that occurrence.

The Respondent argued that the model he selected was the closest, most similar product to the garage light already in place. R Ex. 2. The Claimants provided unrefuted evidence that an equivalent light fixture to what was originally installed on their garage is available for sale to the public, at Lowe's Home Centers, Inc., in Salisbury, Maryland, for the sum of $69.98. C Ex. 25. The Claimants also provided unrefuted evidence that the cost to install such a light fixture would be $60.00. C Ex. 24. The Fund, by and through Mr. London, argued that the Respondent should be liable for the cost to purchase and install an equivalent garage light fixture.

For the reasons discussed above, I agree with the Fund.

B. Deck Staining

The Claimants testified that the deck staining was uneven and did not match the pickets. The Tyler and Jato proposals echo these concerns. C Ex. 12 and 24. The Respondent stated that although the Contract only called for power washing the deck and railings and applying one coat of sealer, he, instead, power washed the deck and railings and applied three coats of stain in an effort to match the desired tan color the Claimants expressed to him was their want. The Respondent explained that he was ultimately unable to perfectly do so, despite his best efforts, because a variance in shade due to age-related wear of the wood comprising the deck prevented the deck from appearing a uniform color. C Exs. 21 and 22; *see* C Ex. 1. This account of events was not disputed on the record before me and, as such, I accept it as fact.

The Fund, by and through Mr. London, suggested the issue may be more correctly framed as not so much being one of an unworkmanlike home improvement, but, rather an aesthetically displeasing but, nevertheless, workmanlike product. Here, too, I am persuaded the Fund is correct.

There is no dispute that the wood that comprises the deck is weathered, of an advanced age, and may absorb stain differently, board-by-board. *See* C Ex. 1. That the Respondent stained the deck of the Claimants' home three times, beyond what was called for in the Contract, strongly suggests that he made every effort to conform the work to the Claimants satisfaction, but the nature of the fixed materials, *i.e.*, the deck itself, and not the quality of Respondent's work was the driver of the ultimate end result. Because the work was performed pursuant to the Contract and there was no testimony the power washing or staining failed to serve their, respective, functional purposes, I cannot conclude, on aesthetics alone, that the Respondent engaged in an inadequate, unworkmanlike or incomplete home improvement as it related to the deck of the Claimants' home.

C. Siding Color

There is no dispute that the color of the siding painted by the Respondent is not uniform with the color of the existing siding. C Ex. 12, 17, and 24; R Ex 2. In email correspondence with Ms. Meadows, the Respondent himself described the result as an "eyesore" and offered that the displeasing result might sufficiently incentivize the Claimants to "pay to have the faded end wall of their home stained the rest of the way with the proper color stain as they had me stain my work with." C Ex 13. While the Respondent testified for an appreciable period regarding the significant lengths, including multiple trips to Sherwin-Williams, he underwent to match the siding stain to the existing siding color, and that he did so in accordance with the dictates of the Spring Chase HOA, it is clear that the Respondent knew that no number of trips to Sherwin-Williams or any other merchant would resolve the problem.

In an undated letter written to Vernon Barnes, a Spring Chase HOA Board Member, in response to his concerns about the marked siding color variance of the Claimants' home, the Respondent wrote "[w]hen it became obvious that the south wall had become so sun faded that the stain was not matching, work was *stopped*, as staining the rest of the wall was not in contract." C Ex. 7 (emphasis added). In the same letter, the Respondent goes on to explain to Mr. Barnes that

"[n]ormally, in situations like this, a change order is agreed upon to stain the rest of the wall at an additional cost, and life goes on." *Id.*

The Respondent also decried what he perceived to be the intransigence of the Claimants, in stymieing his efforts to address their concerns about the work performed pursuant to the Contract, generally, and, specifically, their opportunistic seizing of this incongruence of siding color to "to publically rant to all about shoddy workmanship, incomplete work, and pages of rant, which they are calling a punch list." *Id.* (Internal quotations omitted). Finally and significantly, in the self-same letter to Mr. Barnes, the Respondent explained that the Claimants, at that time, were, in his opinion, not providing him with the necessary access to his painting supplies and, such, he was 'powerless to repair any *deficiencies*." *Id.* (Emphasis added); *see also* C Ex. 25.

This exchange strongly suggests the Respondent was aware that the work he performed was, in fact, deficient, and prematurely ended work on this line item, without the Claimants consent. While there is no question that staining the entirety of the exterior siding of the Claimants' home was not a part of the Contract, "paint[ing] to match house" without question was. R Ex. 4. At the hearing, the Respondent argued that "paint to match house" meant use of Sherwin-Williams' Open Hearth paint only. I find this argument fundamentally specious and belied by the Respondent's own words and deeds.

It is strains reason to find that an experienced contractor like the Respondent would have believed that a complete, adequate and workmanlike home improvement would permit lay observers to note the color variance of the siding clapboards at a distance and garner not only the ire of the Claimants but the Spring Chase HOA, and would be described by the Respondent, in assessing his own handiwork, as an "eyesore." C Exs. 6, 7, 13, and 20.

Further, even prior to submitting the First Proposal, let alone the Contract, the Respondent was on actual notice from Mr. Brumbley's initial home inspection report that the Claimants' home was built in 1990 and that"[m]ost of the exterior siding is original to the house..." and that "[t]here are

many siding boards with water damage." C Ex. 1. From this, I infer that the Respondent knew or should have known at the time he proposed his scope of work for siding replacement in the Contract that much like the deck, the siding clapboards would absorb the stain discordantly, one from the other, due to age. The power washing and sealing of the deck was not accompanied by the statement "paint to match..." however and a variance of color on a deck is arguably less noticeable, discernable and meaningful than the exterior siding of the Claimants' home.

The Fund, by and through Mr. London, offered that should I be persuaded that the Respondent is liable for the siding color farrago, that based on the estimate the Respondent himself provided to the Claimants, the remedial work is valued at $350.00. R Ex 8.

Although the Fund did not take an explicit position endorsing this aspect of the Claim, I am satisfied the Claimants have satisfied their burden of proof to establish that staining a portion of the replaced exterior siding and then stopping without completing the job and leaving markedly noticeable color variations that the creator himself describes as an "eyesore" is not "paint[ing] to match house," under even the most narrow concept of that term, and, is instead, an inadequate, incomplete and an unworkmanlike home improvement. For these reasons, I find the Claimants have met their burden of proof to establish a compensable injury from the Fund for this act and omission of the Respondent.

D. Deficiencies in the Replaced Roof

Sometime after substantial completion of the Contract on September 12, 2014, the Claimants observed an appreciable—four foot by two foot—sag to the roof replaced by the Respondent. So, too, did Jato, as of at least October 20, 2015.[8] C Ex. 24. As a cause for this sagging, Jato observed that H clips were necessary but were not installed between the sheathing and before the installation of the shingles. Significantly, however, Jato offered merely that "if left unrepaired leaks *could* arise in

[8] The Fund argued, and I agree, that the Tyler and Jato proposals are of little value in calculating damages because they provide, with an exception not applicable here, merely the total cost as a final sum not separated out into its constituent parts. C Exs. 12 and 24. For these reasons, aside from the evidentiary concerns present in considering unsworn factual assertions and opinion statements without foundation I can give these proposals but little weight. *See* 28.02.01.21E and H (an administrative law judge may accept a sworn pre-filed written testimony or a sworn affidavit as evidence but the regulations are silent as to the propriety of evidentiary weight being assigned to an unsworn document).

future." *Id.* (Emphasis added). The Claimants' acknowledged that of the date of hearing, no water leakage in their home had been detected.

At the hearing, Mr. Holland, who has an undergraduate degree in construction management, was a former home builder, served as a city building inspector since 1991 and the department's director since 1994, and in that time has conducted thousands of home inspections, and the Respondent, an experienced contractor, both testified that the use of H clips in the Claimants' roof replacement project was literally an impossibility because there simply is not room for the H clip, the sheathing and the shingle to all exist in harmonious accord on the roof of the Claimants' home. Mr. Holland also testified that the city building code only requires the use of H clips for new construction and a portion of an existing roof can be replaced without the use of H clips and be in compliance with the relevant city building code provisions.

Further, Mr. Holland noted that he visually inspected the roof of the Claimants' home on or about October 19, 2015 and he observed no dips or sags. Finally, Mr. Holland offered his opinion that a mere sag, without more, would not expose the roof to water trespass as long as the underlayment was properly installed, and that unless a sag was affecting the structural integrity of a building he would leave it untouched.[9]

Mr. Goblinger testified that he visually inspected the exterior of the Claimants' home, twice, approximately one year apart, and on the latter occasion in September or October of 2015 he saw a limited view of the roof through a three foot by three foot opening inside the Claimants' home and did not observe any sagging, which Mr. Goblinger explained was a way to describe a bow in the sheathing, which, in turn, he explained is the plywood structure that the roofing shingles rest on. Finally and

[9] Although Mr. Holland was not qualified as an expert witness, I am satisfied that a proper foundation was laid for him to provide opinion statements regarding the construction field, generally, and building codes, specifically, and I gave given his opinions the appropriate weight, after consideration of the entirety of the credible evidence of record. Md. Code Ann., State Gov't §10-213(b) (2014) (an administrative law judge may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence); *see also* COMAR 28.02.01.21B.

significantly, Mr. Goblinger unequivocally averred that a sag or dip in a roof, alone, is not a violation of the city building code.

On these salient points, the testimony of Messrs. Holland and Goblinger and the Respondent were credible and wholly undisputed by the Claimants or the Fund, and so I find their respective testimony as fact, on the record before me.

In considering this aspect of the Claim, I am particularly mindful of the fundamental principles of reasonableness and fairness that undergird administrative decision-making, generally, and the nature, design and purpose of the regulatory scheme governing claims against the Fund, specifically, which are founded on bedrock principles of notice to the errant contractor and an opportunity to cure any inadequate work before the law provides a remedy. *Cf.* Md. Code Ann., Bus. Reg. § 8-405(d) (2015) (the MHIC may deny a claim if it finds that a claimant unreasonably rejected good faith efforts by the contractor to resolve the claim); *see also* Md. Code Ann., Bus. Reg. § 4.5-705(b) (2015) (claimant is required to give new home builder written notice of the alleged defect(s) and access to the property to inspect the alleged defect(s), determine the cause, and remedy it within a reasonable period of time). Here, the Claimants did not make the Respondent aware of their concerns regarding the sag in the roof he replaced until the date of the hearing, preventing the Respondent from making any efforts to cure the sag. This is in disconcert with the purpose of the regulations that govern claims against the Fund. *See* COMAR 09.08.03. Moreover, the Claimants did not establish that a sag in the roof, alone, is inadequate or unworkmanlike *per se*. Even I were, for the sake of argument and without so deciding, to fully credit the Claimants arguments in this regard, the proposal from Jato describing the risk of water leakage, the sole evidence the Claimants have to support their position, is too attenuated to be dispositive. *See* C Ex. 24 ("if left unrepaired leaks *could* arise in future") (emphasis added).

Weighed against the testimony of the Respondent's witnesses are the testimony of the Claimants and the Jato proposal. I find that neither Messrs. Holland nor Goblinger had any incentive

in the outcome of the case or other motivation to provide anything other than a strict recitation of the truth in their respective testimony before me. I found their testimony to be measured and neutral and not appearing to favor or be biased toward any party. Weighed against a document that cannot be cross-examined and contains myriad statements of conclusion and the Claimants otherwise unsupported testimony, I find the testimony of the Respondent's witnesses more persuasive and compelling, and find their testimony to be credible, competent, and determinative evidence on this point.

The Fund, by and through Mr. London, ultimately argued that the Claimants had simply failed to meet their burden of proof to establish that it was "more likely so than not so" that the sagging roof occurred due to the Respondent's incomplete, inadequate or unworkmanlike performance under the Contract.

For the foregoing reasons, I agree with the Fund.

E. PVC Type Trim Board

There is no question that the work agreed to under the Contract called for the replacement of trim boards at the chimney housing with PVC type trim boards, but the Respondent utilized wood trim boards instead because the PVC type boards were not sufficiently thick. R Ex. 4. The Respondent acknowledged at the hearing that he did not discuss this with the Claimants or obtain their consent before making the change in materials. The Contract does not provide for such a unilateral action. *Id.* For these reasons, the Fund, by and through, Mr. London, recommended I find this action on the part of the Respondent to be unworkmanlike and inadequate, and based on the Respondent's own estimation would cost $50.00 to cure, for the cost of material. Like the Fund, I am persuaded this act of the Respondent was indeed unworkmanlike and inadequate and agree the sole available measure of damages is correct, the Respondent's most accurate estimation.[10]

[10] *See* footnote eight, above.

F. Gutter Guard, Improper Repair of a Section of Fence, Removal of Metal Flashing, and the Chimney

On September 24, 2014, the Claimants expressed their concern to Ms. Hughes at SNHS that the Respondent, or one of his sub-contractors or employees, had dented their gutter guard. C Ex. 27. The Claimants' freely acknowledge they did not witness the event occur but offer merely that the gutter guard was not dented prior to the Respondent's work on the Claimants' home and it was after. Two events occurring in temporal proximity does not, alone, impute a casual linkage, however. *See Cont'l Group v. Coppage*, 58 Md. App. 184, 190 (1984) ("[t]he law requires proof of probable, not merely possible facts, including causal relations. Reasoning *post hoc, propter hoc*[11] is a recognized logical fallacy, a *non sequitur*[12]. But sequence of events, plus proof of possible causal relation, may amount to proof of probable causal relation, in the absence of evidence of any other equally probable cause" (internal citation and emphasis omitted).

As the Claimants are of advanced age and in ill-health, I reasonably infer, although very spirited, they are too infirm to ascend the roof of their home and engage in activities injurious to gutter guards. I am satisfied that the Respondent and the persons he engaged to sub-contract the home improvements to the Claimants' home were the sole and only persons to have access to the gutter guard in question and no party has provided evidence of any sort that ferocious weather or some other intervening agent may have severed the causal linkage to the Respondent's acts.

Therefore, for these reasons, and although the Fund took no position on this aspect of the Claim, I am satisfied the Claimants have meet their burden of proof and satisfactorily established, using an estimate prepared by Gutter Guard of the Eastern Shore on October 6, 2015, the proper measure of damages to be $145.00. C Ex. 26.

---

[11] "After this, therefore resulting from it. The logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential." *Black's Law Dictionary* 1355 (10th ed. 2014).
[12] "It does not follow. An inference or conclusion that does not logically follow." *Black's Law Dictionary* 1221 (10th ed. 2014).

There is no dispute that the Respondent performed a home improvement for the Claimants outside the scope of the Contract. Namely, replacing one section of fence surrounding the propane tank in the yard of the Claimants' home. C Ex. 21. There is also no dispute that this work was performed inadequately and must be repaired. C Exs. 12 and 24. The Respondent did not meaningfully dispute the Claimants', Tyler's, and Jato's assessment of the work in question, but contended, instead, that because he performed work outside the Contract and did not charge the Claimants a fee for so doing, he ought not be liable for the cost to repair the work he performed, how matter how poorly. The Fund disagreed.

Mr. London offered the Fund's position that whether the work was provided for in the Contract or performed at no cost is of little moment. Instead, Mr. London explained the Respondent is still responsible for the quality of his work even if performed without charge. I am persuaded the Fund is correct. Without regard to whether the work was contracted or paid for, it was a home improvement performed in an inadequate way. This is an injury compensable by the Fund. The only reasonable measure of damages are those estimated by the Respondent himself, an experienced contractor, in the sum of $240.00.

Similar to the replacement of the segment of fencing, the Respondent, also outside the specific scope of work contained in the Contract, but in order to gain access to parts of the Claimants' home he needed to access to perform work under the Contract, removed pieces of metal flashing flush against the foundation of the Claimants' home. Metal flashing is used to keep water out of the foundation and was removed by the Respondent in order to move the dirt grade and replace siding clapboards. The Respondent did not replace the flashing he removed because he felt it would lead to water leakage. C Ex 19. The Respondent did not remove the entirety of the flashing as it extended to areas of the Claimants' home wholly outside the scope of work provided in the Contract. The remaining pieces of metal flashing are sharp and injurious to an unsuspecting passer by. C Ex. 12. The Respondent estimated the cost to remove the remaining piece of metal flashing to be $100.00.

Much like the analysis above, whether the removal of the metal flashing was specifically agreed to and paid for in the Contract is of little moment. What is dispositive, however, is that the Respondent performed a home improvement incompletely and in an unworkmanlike manner. *See* C Ex. 12 and 24. I am persuaded this is the case from the undisputed testimony of the Claimants', supported by Tyler and Jato, and I do not find meritorious or remotely tenable the Respondent's position, taken to its logical end, that home improvements performed at no cost can be performed in an incomplete, inadequate or unworkmanlike manner with no recourse for a claimant and no consequence for a contractor. Absent clear authority explicitly stating this position, I am not persuaded it is correct or in accord with the public policy of the MHIC, the Department, or the State. For these reasons, the Respondent's arguments fail and I find the Claimants have established a compensable loss from the Fund in the sum of $100.000 to remove the remaining metal flashing from the foundation of the Claimants' home.

Finally, turning to the last aspect of the Claim, the Fund, by and through Mr. London, argued that the Contract is silent as to any improvements to the Claimants' home involving the chimney cap or pipe, and, as such, this work is outside the scope of the Contract, never discussed or agreed to by the parties to the Contract, and never performed. After a close review of the Contract, I am persuaded the Fund is correct. The Contract does not provide for any work to be performed on the chimney cap and pipe and the Respondent avers that none was agreed to or performed. I find the Respondent's assertions credible on this point. I conclude, therefore, that any failure to perform this work cannot be an incomplete, inadequate or unworkmanlike home improvement since it was never a part of the Contract, agreed to by the parties to the Contract, or performed by the Respondent.

I thus find that the Claimants are eligible for compensation from the Fund for the above described work agreed to in the Contract or performed incidentally to the Contract in an inadequate, incomplete or unworkmanlike manner.

II. Award of Compensation from the Fund

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimants are entitled. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1).

MHIC's regulations offer three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3)(a)-(c). As explained more fully below, none of those prescribed formulas are appropriate in this case, and thus I shall apply a formula unique to the facts of this matter, as described below. COMAR 09.08.03.03B(3).

It is undisputed that the work was performed for the full contract price of $10,020.00[13] and all but thirty dollars of this sum were tendered by SNHS, on the Claimants' behalf, to the Respondent after the Contract completion date. Thus, the Claimants' actual loss must be measured by the cost necessary to remediate the Respondent's work, as the full contract work was performed for nearly the full contract price, minus the thirty dollars still owed to the Respondent under the Contract.

At the hearing, the Respondent, who has extensive experience as a general contractor, testified that the cost to install PVC type trim boards at the chimney housing would be fifty dollars, that the cost to remove the remaining piece of metal flashing would be $100.00, that the cost to restain the siding to a uniform color would be $350.00, and that repairing the section of replacement fence around the propane deck would be $240.00. Pursuant to Lowe's offer for sale and Jato's proposal providing an installation fee for the garage lamp, the cost of the replacement, equivalent brass garage light fixture would be $129.98. Finally, based the upon undisputed cost estimate supplied by Gutter Helmet of the Eastern Shore, the cost to replace the dented gutter guard would be $145.00. Adding these sums together and subtracting the thirty dollars due to the Respondent under the terms of the Contract, the Claimants total compensable loss from the Fund is $984.98. C Ex. 26. As these sums have not been

[13] With the additional five hundred dollars provided by Ms. Whittaker to yield a total of $10,520.00. R Ex. 4.

disputed or refuted, and are the only reasonable measures of loss available to me, I find they are the correct measure of the Claimants' actual loss. COMAR 09.08.03.03B(3).

PROPOSED CONCLUSION OF LAW

I conclude, as a matter of law, that the Claimants have sustained an actual and compensable loss of $984.98 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 Claimants $984.98; 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;[14] and

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

Signature on File

May 3, 2016
Date Decision Issued

Steven V. Adler
Administrative Law Judge

SVA/da
160703

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

PROPOSED ORDER

WHEREFORE, this 6th day of June, 2016, 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

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

The Maryland Home Improvement Commission	*	**BEFORE THE MARYLAND HOME IMPROVEMENT COMMISSION**
v. Gary Bullard t/a Gary Bullard Construction Company (Contractor)	*	**MHIC No.: 15 (75) 632**
and the Claim of John & Bernice Weeks (Claimant)	*	

****

FINAL ORDER

WHEREFORE, this 12th day of September 2016, Panel B of the Maryland Home Improvement Commission ORDERS that:

1. **The Findings of Fact set forth in the Proposed Order dated June 6, 2016 are AFFIRMED.**
2. **The Conclusions of Law set forth in the Proposed Order dated June 6, 2016 are AFFIRMED.**
3. **The Proposed Order dated June 6, 2016 is AFFIRMED.**
4. **This Final Order shall become effective thirty (30) days from this date.**
5. **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

GARY BULLARD, t/a GARY BULLARD CONSTRUCTION CO.	*	**IN THE CIRCUIT COURT**
	*	**FOR WICOMICO COUNTY**
Petitioner	*	
v.	*	
MARYLAND HOME IMPROVEMENT COMMISSION	*	**Case No. 22-C-16-001407 AA**
	*	
Respondent	*	

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

ORDER

On this 16th day of June, 2017, this Court **ORDERS** that the decision of the Maryland Home Improvement Commission dated September 12, 2016 is **AFFIRMED.**

Signature on File

TRUE COPY, TEST

JUDGE