

CLAIM OF RICHARD REBSTOCK	* BEFORE WILLIAM SOMERVILLE,
AGAINST THE MARYLAND HOME	* AN ADMINISTRATIVE LAW JUDGE
IMPROVEMENT GUARANTY FUND	* OF THE MARYLAND OFFICE
FOR VIOLATIONS ALLEGED	* OF ADMINISTRATIVE HEARINGS
AGAINST PAUL W. MAUER	*
T/A	* OAH NO.: DLR-HIC-02-16-24432
LEVELIFT SYSTEMS, INC.	* MHIC NO.: 15 (75) 653

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 7, 2015, Richard Rebstock (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of funds for actual losses suffered as a result of home improvement work performed by Paul W. Mauer t/a Levelift Systems, Inc. (Respondent), a contractor who held an MHIC license.

I held a hearing on January 26, 2017 at the Tawes State Office Building in Annapolis. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear.

The Respondent was properly notified at his last known address but he failed to appear. The absence of the Respondent was addressed as a preliminary matter. On or about November

25, 2016, counsel for the Respondent's estate entered an appearance and represented that the Respondent died on September 18, 2014. Counsel wrote, "[T]he Estate does not see any meaningful purpose to defend this matter." The hearing proceeded without a representative of the Respondent. Md. Code Ann., Bus. Reg. §8-312(h) ("If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter").

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUE

Did the Claimant sustain an "actual loss" compensable by the Fund as a result of the acts or omissions of the Respondent, and if so, what is the amount of the compensable "actual loss"?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

1. Claimant document and copies of two checks
2. Packet of permit documents
3. Self-performed-work-of-deficiencies table
4. Packet of photographs
5. Notification of death, 12-29-2014
6. [Not entered into evidence]
7. Packet of remedial contract documents, estimates, and checks
8. Self-performed-work table

9. [Not entered into evidence]

10. Summary-of-costs table

I admitted the following exhibits offered by the Fund:

1. Hearing Order mail
2. Notice of Death, 11-25-2016
3. Licensing History
4. Claim Form, 12-1-2015
5. Note, 12-16-2015

Testimony

Scott Dower (qualified to offer opinions in the field of “residential foundation failures”) and the Claimant testified in the Claimant’s case.

The Fund called no witnesses.

PROPOSED FINDINGS OF FACT

Upon considering demeanor evidence, testimony, and other evidence offered, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent held an MHIC contractor license. He traded as “Levelift Systems, Inc.”
2. Before August 2011, the Claimant discovered that his house and its foundation were shifting and not level.
3. On or about December 13, 2011, the Claimant entered into a home improvement contract with the Respondent. On that date, the Claimant signed a contract document and paid the Respondent \$12,500.00.
4. According to the contract, the Claimant was to pay a total of \$68,405.00 and the Respondent was, among other things, to lift and anchor Claimant’s residence by first

installing six helical tie-back anchors and 23 forty-foot foundation support piers. The Respondent would then lift and secure the house in certain areas in order to level it. All of the piers were to be installed on the exterior of the dwelling. A draw schedule was included in the contract.

5. The Respondent began working on the project in August 2012.
6. The Respondent and his work crew worked on the house for about a week and then the Respondent or his crew worked only intermittently on the project.
7. Sometime thereafter, the Respondent and the Claimant modified their agreement, verbally, such that the support piers could be installed within the footprint of the house, through the basement floor.
8. On February 28, 2014, the Claimant paid to the Respondent \$24,380.00.
9. Work on the project stagnated.
10. The last date when the Respondent or his crew performed work on the project was August 19, 2014. Among other things left undone, were the helical piers, which were not installed. Without the piers, the house could not be lifted and leveled.
11. On September 18, 2014, the Respondent committed suicide.
12. On December 15, 2014, the Claimant filed with the MHIC a complaint.
13. On December 1, 2015, the Claimant filed with the MHIC a claim against the Fund.
14. In an attempt to complete the stabilization and lifting project, the Claimant hired Professional Consulting Corp. As of August 21, 2015, the Claimant paid that company \$9,000.00 for site engineering and consulting work.
15. The Claimant also hired Avon Corp. to install the remaining 17 helical piers. By July 27, 2016, the Claimant had paid that company \$31,251.00.

16. The Claimant also hired RCS Construction, LLC, to do concrete work in the basement of the house. That interior concrete work was contemplated by the verbally modified agreement between the Claimant and the Respondent. By October 5, 2016, the Claimant had paid RCS Construction, LLC, \$33,042.66. That amount included “exterior new work” in the amount of \$2,650.00 which was work not contemplated by the original contract with the Respondent.
17. The Claimant also hired Harry C. White t/a Harry White House Movers to jack up and level the house once the piers were installed. The house was jacked up and secured so that a foundation could be built under it, and then the house was lowered onto the foundation. By December 5, 2016, the Claimant had paid \$12,000.00 to that company for that work.
18. All of the work done by the remedial contractors was necessary and reasonable to complete the project.

DISCUSSION

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)¹. 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.

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

A claimant has the burdens of production and persuasion² to establish the "inadequate, incomplete or unworkmanlike" work product of the contractor, as well as to establish the cost of the "actual loss." Md. Code Ann., Bus. Reg. § 8-407(e).

In the instant case, the Claimant has clearly demonstrated an instance in which the Respondent, a licensed home improvement contractor, failed to perform the home improvement contract and otherwise left incomplete work product. (Findings of Fact 4 and 10.) Md. Code Ann., Bus. Reg. §§ 8-401. When the Respondent died and his company abandoned the project, the house had not been -- and could not be -- lifted, leveled, and secured because many of the piers had not been installed.

The Claimant not only needs to prove the inadequate, incomplete, or unworkmanlike work product, but he must also prove the "actual loss." Md. Code Ann., Bus. Reg. § 8-401. "Actual loss" can include the cost to complete such a project. *Id.* In the instant case, the proof was clear. The Respondent was paid \$36,880.00. Of the 23 support piers contemplated by the contract, the Respondent only installed six. Then the work ceased. Without the piers, the rest of the project could not move forward. The house could not be lifted, leveled, or anchored. Remedial contractors were needed to complete the project.

Remedial contractors were hired to complete the project. Their fees and costs for work attributable to completing that work contemplated by the contract with the Respondent was \$82,643.66. (Findings of Fact 14, 15, 16, and 17.)

Having determined that the Claimant has shown that the Respondent was responsible for incomplete home improvement work with regard to the project, further analysis of an amount of

² Maryland law has long recognized that the "burden of proof" is more precisely discussed in terms of a burden of production and a burden of persuasion. Since before 1999, a third such burden has been addressed in Maryland, that being the "burden to plead." *Owens-Corning v. Walatka*, 125 Md. App. 313, 325 (1999) (citing Lynn McLain, *Maryland Evidence* § 300.1, at 132 (1987)).

“actual loss” is appropriate. 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).

Unless a claim requires a unique measurement, actual loss is measured by one of the three following formulas:

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

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

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant’s actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

COMAR 09.08.03.03B(3).

In the instant case, I am applying the third option. Based on the credible evidence offered, as described above, I calculate the Claimant’s actual loss using the formula in COMAR 09.08.03.03B(3)(c) as follows:

\$36,880.00	paid toward the original contract price
+\$82,643.66	reasonable amounts paid to complete the contract
<u>-\$68,405.00</u>	Original contract price
\$51,118.66	Actual Loss

Recovery for "actual loss," as that term is defined in the statutory scheme, is limited to \$20,000.00. Md. Code Ann., Bus. Reg. §8-405(e). Thus, the *compensable* actual loss in this case is \$20,000.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has proven that he has sustained a compensable "actual loss" of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401.

PROPOSED ORDER

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

ORDER that the Claimant be awarded \$20,000.00 from the Maryland Home Improvement Guaranty Fund; and further

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

Signature on File

April 25, 2017
Date Decision Mailed

William J.D. Somerville III
Administrative Law Judge

WS/emh
#167694

PROPOSED ORDER

WHEREFORE, this 24th day of May, 2017, 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.

Robert Altieri

***Robert Altieri
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION