IN THE MATTER OF THE CLAIM	*	**BEFORE TARA LEHNER,**
OF BRENDA SCROGGINS,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF SYED HASAN, T/A	*	
CAPITAL IMPROVEMENT	*	
CONTRACTORS, LLC,	*	**OAH No.: DLR-HIC-02-16-10183**
RESPONDENT	*	**MHIC No.: 16 (90) 618**

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 14, 2015, Brenda Scroggins (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $26,444.00 in alleged actual losses suffered as a result of a home improvement contract with Syed Hasan, trading as Capital Improvement Contractors, LLC (Respondent).

I held a hearing on August 3, 2016, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).[1] The Claimant and Respondent appeared and represented themselves. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural regulations, 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, 09.08.02.01B, and 28.02.01.

ISSUES

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

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1	Notice of Hearing, June 21, 2016, with Hearing Order, March 15, 2016
GF Ex. 2	MHIC Licensing Information for the Respondent, printed July 27, 2016
GF Ex. 3	Letter to the Respondent from the MHIC, January 4, 2016, with Home Improvement Claim Form, December 14, 2015
GF Ex. 4	Contract between Claimant and Respondent, April 15, 2011
GF Ex. 5	Change Order, December 31, 2012
GF Ex. 6	Photograph of cracked grout

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

Cl. Ex. 1	Photographs, A through G
Cl. Ex. 2	Photographs, A through E
Cl. Ex. 3	Photograph

[1] All references to the Business Regulations Article are to the 2015 Replacement Volume.

Cl. Ex. 4	Handwritten notes by Claimant, May 20 to December 10, 2015
Cl. Ex. 5	Handwritten notes by Claimant, August 27 to December 27, 2015
Cl. Ex. 6	Handwritten notes by Claimant entitled Problems to be Addressed, undated
Cl. Ex. 7	MHIC Complaint Form, signed November 2, 2015
Cl. Ex. 8	Advance Remodeling Inc. Contract proposal, December 10, 2015
Cl. Ex. 9	Emails from Paul Mesmeringer to Claimant, April 29, 2016

The Respondent did not offer any exhibits into evidence.

Testimony

The Claimant and Respondent both testified on their own behalf and neither presented any additional witnesses. The Fund did not call 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 matter of this hearing, the Respondent was a MHIC licensed home improvement contractor. The Respondent trades as Capital Improvement Contractors, LLC.

2. On or about April 15, 2011, the Claimant and the Respondent entered into a contract to remove the back part of her home and to enclose the newly exposed potions, as well as to convert one of her top floor bedrooms into a bathroom (Contract). The total price of the Contract was $26,838.00.

3. The Contract work was being performed on the Claimant's home in Baltimore City, Maryland. This is the Claimant's primary residence.

4. On December 31, 2012, the parties executed a Change Order amending some of the scope of work due to unforeseen circumstances. The Contract Price increased by $4,613.00 to a total Contract price of $31,451.00.

5. The Respondent was paid $31,451.00 for completing the Contract work.

6. The Housing Authority of Baltimore City (Housing Authority), Rehabilitation Services Department, paid the Respondent for the Contract work. The Housing Authority placed a lien against the Claimant's property for the $31,451.00. If the Claimant lives in the home for a specific number of years the debt is forgiven; otherwise, she is responsible for repayment of the loan upon transfer of ownership.

7. On December 31, 2012, the Respondent was still performing work under the Contract at the Claimant's home.

8. When the Respondent completed the Contract work, the Claimant was pleased with the Respondent's work and there were no indications or warning signs of any problems at that time.

9. One of the items the Respondent did was to replace the ceiling in the Claimant's new bathroom. When the Respondent replaced this ceiling, there was no evidence of a roof leak or water damage.

10. Sometime after the Respondent completed the Contract work, water began to leak through holes the Respondent placed in the Claimant's existing roof. These holes were put in place by the Respondent for plumbing vent and bathroom fan vent pipes. The ceiling and walls that were installed by the Respondent were damaged by this leak. The location of the water damage is directly below where the Respondent installed the vent pipes.

11. Sometime after the Respondent completed the Contract work, the grout between the bathroom tiles he installed cracked.

12. Sometime after the Respondent completed the Contract work, the marble saddle he installed at the threshold of the bathroom cracked.

13. On May 20, 2015, the Claimant called the Respondent to ask him to come and make repairs to the home. The Respondent said he would come to the home the following Tuesday.

14. On August 27, 2015, the Claimant called the Respondent and stated that she had not heard from him in three months. The Respondent asked her to call him back on August 28, 2015.

15. On August 28, 2015, the Claimant called the Respondent and left a voice mail.

16. On September 3, 2015, the Claimant called the Respondent. The Respondent said he would be at the Claimant's home by noon. The Respondent never came to the Claimant's home that day and did not call the Claimant to provide an explanation. Instead, two of the Respondent's workers came and inspected the issues and told the Claimant they would be back.

17. On September 9, 2015, the Respondent told the Claimant that he would address the issues in her home when the weather was better.

18. On October 27, 2015, the Claimant mailed a list of concerns regarding the Respondent's work to the Housing Authority and the Respondent. She included problems with the bathroom ceiling cracking and peeling, the bathroom tile grout cracking, and the cracked marble threshold.

19. On November 3, 2015, the Respondent told the Claimant that he would be at her house in a week.

20. On December 10, 2015, the Claimant obtained an estimate from Advance Remodeling Inc. to repair the wall and ceiling that was damaged by a water leak, and to repair the cracked tile grout and threshold.

21. On December 10, 2015, the Claimant called the Respondent and left a voicemail reminding the Respondent that he told the Claimant on November 3, 2015 that he would come to her home.

22. On December 14, 2015, the Claimant filed her Claim with Fund.

23. The Respondent never went onto the Claimant's roof to evaluate the water leak.

24. The Claimant is not: 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.

25. The Contract does not contain an arbitration clause.

26. The Claimant has not taken any action to recover monies from the Respondent other than the instant Claim.

DISCUSSION

Substantive Law

The Claimant bears the burden of proof, by a preponderance of the evidence, that she is entitled to an award from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). She 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 the Claimant for consequential or

punitive damages, personal injury, attorney's fees, court costs, or interest, and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5); COMAR 09.08.03.03B(1).

In addition, the Claimant must prove that at all relevant times: (a) she owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) she 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) she did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) any remedial work was done by licensed contractors; (f) she 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 she did not recover for the actual loss from any source; and (h) she filed the claim with the MHIC within three years of the date she 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).

Analysis

Undisputed Matters

The Claimant and the Fund agree that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. In addition, the Claimant presented the following uncontroverted evidence: the Claimant's only home, the subject property, in is Baltimore City, Maryland; she is not an employee, officer or partner (past or present) of the Respondent; she is not an immediate relative of the Respondent, his spouse or any of his partners, officers or employees; she has not recovered for the Respondent's acts or omissions from any other source; and there are no actions or claims for the Respondent's acts or omissions pending in any court of competent jurisdiction or with any other source of recovery.

Limitations

The Respondent asserted that the Claimant's Claim is time barred by section 8-405(g), as, in his opinion, the Claim was not filed within three years of when the Claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage. Both the Claimant and the Respondent were very unreliable witnesses regarding the specific time frame that the work completed under this Contract. The Claimant believed most of the work was completed in 2014; the Respondent believed the work was completed either in 2012 or 2013. However, a Change Order admitted into evidence as Fund Exhibit 5 provides the needed clarity. The Change Order was executed by the Claimant and Respondent on December 31, 2012, and documents that, at that time, the Respondent had previously begun the Contract work, but still had additional work to complete at the Claimant's home. *See* Fund Ex. 3, page 1 ("3. The Existing rear wall bricks between the floor joists on both floors are deteriorated or missing and they have to be rebuild [sic] in order for us to attach our band board with bolts to the brick walls so we can build the mud room as per the original scope of work.").

Both parties agree that when the Respondent completed the Contract work, the Claimant was pleased with his work and there were no indications or warning signs of any problems at that time. There is no dispute that the water damage and the cracked grout and threshold manifested sometime later. Accordingly, because the Change Order documents that the Respondent was still working at the Claimant's on December 31, 2012, and the Claimant filed the Claim on December 14, 2015, less than three years after the Change Order, her claim is not time barred by section 8-405(g).

The Home Improvement

With regard to the home improvement, there is no dispute that the Claimant and the Respondent entered into a Contract for the demolition of the back of her home that was separating from the main part of the home, the enclosure of the newly opened part of her home, and the conversion of an upstairs bedroom into a bathroom. There is also no dispute that the Respondent completed the work under the Contract, that the Respondent was paid for this work, and that the Claimant was very pleased with the work performed by the Respondent at the time he completed the work.

The Claimant testified that approximately four to six months after the Respondent completed the Contract work, water began to seep into the Claimant's new bathroom through the ceiling and walls that the Respondent had installed. Additionally, the grout between the tiles of her bathroom floor, and the marble saddle at the entrance to her bathroom, started cracking. It is undisputed that the Respondent installed both of these items. The Claimant testified that she called the Respondent, and that he sent some of his employees to her house to plaster the wall and ceiling at the location of the water damage. However, as documented by the pictures offered by the Claimant, the plasterwork did not stop the water from continuing to enter her home. In fact, the Claimant's pictures evidence that the water damage became more and more significant after each rainfall. The Claimant was unable at the hearing to explain why the tile grout and saddle cracked; however, pictures she offered demonstrated the damage. With regard to the marble saddle, the Claimant explained that the marble saddle cracked a first time just after it was installed by the Respondent, and that the Respondent immediately replaced it, but that it has since cracked again after the Respondent finished the work at the home.

The Respondent testified that he should not be held responsible for these issues. He offered that he had completed the work over a year before the water leak began and the cracks appeared, and stated that his work was only warranted for one year. He admitted that as part of the bathroom project, he was required to install a plumbing vent pipe, and that he put this pipe through the Claimant's existing roof in the exact location of the water leak; however, he stated that if the leak was caused by his installation of that pipe, it was a result of a poor quality product (the rubber flashing surrounding the pipe is known to deteriorate quickly and cause leaks) and not the result of his poor workmanship. He offered his professional opinion that the leak was the result of the house and roof being old, although he testified that he never went up on the roof to evaluate the roof or the leak. On cross-examination, he admitted that when he replaced the ceiling in bathroom, he did not observe any water damage in that area. He also testified that the cracked grout and saddle were "probably" because the house was one hundred years old and settling; although he did not offer any evidence to support his conclusion.

With regard to the water leak, I find the leak is the result of an inadequate and unworkmanlike home improvement by the Respondent. Paul Mesmeringer, an inspector with the Baltimore City Housing Authority, who is charged with monitoring work completed by contractors receiving Housing Authority loan funds, performed an inspection of the Claimant's property in April 2016, and his Project Progress Report was offered by the Claimant into evidence. Cl. Ex. 9. In his Report, Mr. Mesmeringer noted that the Respondent installed two types of vent pipes through the Claimant's existing roof; one for plumbing and one for an exhaust fan. *Id.* He found the location of these pipes in relation to the leak in the ceiling significant; he noted that the plumbing vent pipe was "directly over the leak area." *Id.* He also noted that the exhaust fan pipe, that was installed "adjacent" to the plumbing vent pipe, did "not have the proper shape … to reliably keep the water out of the exhaust during driving rains." *Id.*

The pictures admitted into evidence document substantial and considerable water damage in the exact location of the vent pipes that were installed by the Respondent.

The evidence that the water leak occurred at the exact location of the vent pipes installed by the Respondent, coupled with the Respondent's testimony that there were no leaks in the Claimant's roof prior to the installation of these pipes, proves by a preponderance of the evidence that the leak was caused by the Respondent's work. This conclusion is further supported by the fact that there is no evidence in the record, beyond the Respondent's speculation, that the Claimant's roof was old and defective. Additionally, the fact that the Respondent was aware that the rubber flashing associated with the part he used was defective and was known to fail and cause leaks not long after installation, and the fact that he continued to utilize this product and/or failed to address this known defect when installing this part, further support my finding that his work was inadequate.

I also find, by a preponderance of the evidence, that the cracked tile grout and the cracked marble threshold were the result of the Respondent's inadequate work. The Claimant corroborated her testimony regarding the existence of the defects with pictures. She wrote to the Baltimore City Housing Authority in October 2015, and copied the Respondent, complaining of these concerns. The Respondent offered his uncorroborated and unsupported opinion that this damage was caused by the settling of the Claimant's house. His opinion, however, is nothing more than speculation and conjecture given he never went to the property to inspect the damage despite the Claimant's repeated requests for him to do so. Further, there is no evidence in the record that supports the Respondent's opinion that the Claimant's home is settling.

The Respondent asserted that that the Claimant did not permit him to come and remediate the problems at the home, and thus, under section 8-405(d), her Claim should be denied. The Respondent, however, did not provide any additional evidence to support this allegation. The Claimant, in contrast, provided abundant evidence that she provided the Respondent many opportunities to come and make repairs. Her testimony, as corroborated by her contemporaneously written notes, evidences that she called the Respondent many times between May and December 2015, and despite multiple promises by him to come to assess and remediate the problems, the Respondent failed to make good on these promises. Once the Respondent sent some of his workers to plaster over the area where the water was seeping through; however, the Claimant's pictures document that the plaster was applied in a haphazard manner, in a very visually displeasing way, and was never sanded and repainted. Most importantly, this repair was not at all effective in remediating the leak. The evidence, therefore, is that the Appellant gave the Respondent ample opportunities to make repairs; and that the Respondent failed to utilize the opportunities presented to him.

The Award

MHIC's regulations provide three formulas for measurement of a claimant's actual loss. I conclude that COMAR 09.08.03.03B(3)(c) is the appropriate measure.[2] The Respondent did perform work under the Contract and the Claimant has not had any of the work repaired as of the

[2] COMAR 09.08.03.03B(3)(c) states as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

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

date of the hearing. She did, however, solicit a proposal from a licensed contractor to repair the inadequate work, and this proposal was admitted into evidence. Under this formula, the Claimant's actual loss is the amount she paid the Respondent, plus any reasonable amount of additional money she will pay a subsequent contractor to repair the work deemed inadequately installed by the Respondent, less the original Contract price. COMAR 09.08.03.03B(3)(c).

It is undisputed that the Respondent was paid $31,451.00 for the completed work, as delineated in the Contract and the Change Order. The Claimant submitted a repair proposal from Advance Remodeling, Inc. (Advance), stating that Advance would repair the bathroom tile damage at the cost of $2,897.00, it would patch and paint the ceiling and wall at the location of the water leak at the cost of $300.00, and replace the cracked marble threshold for $450.00. Advance's estimate's total for all of this work is $3,647.00. Advance is a Maryland licensed contractor and the estimate provided by Advance is detailed and specific. At the hearing, the Respondent asserted that the Advance estimate is inflated; however, once again, the Respondent presented no evidence to support his conclusion. The Fund did not raise any concerns, or present any evidence that Advance's cost estimate was unreasonable.

The estimate from Advance also lists the installation of forty-five feet of four inch baseboard, as well as the recoating of the "main house roof." (Cl. Ex. 8.) There is no evidence in the record to support a determination that the Claimant's base board was installed inadequately by the Respondent. There is also no evidence that recoating the Claimant's roof will repair the water leak; in fact, the Respondent stated that recoating the roof would not repair the leak caused by the installation of the vents. Therefore, I do not make an award based on these two items.

The Respondent and the Fund raised a question as to whether the Claimant is barred from recovering from the Fund because the money used to pay the Respondent was provided by the Housing Authority. The evidence in the record is that, although the money was paid by the

Housing Authority, the Housing Authority placed a lien against the Claimant's property, and upon transfer of ownership of the property, the Claimant is responsible for repaying the Housing Authority. Based on this evidence, I conclude that the Housing Authority paid the Respondent on behalf of the Claimant, and thus, the Claimant may assert her Claim and make a recovery from the Fund. *See* Md. Code Ann., Bus. Reg. § 8-405(e)(5) (the Fund may not make an award in "an amount in excess of the amount paid by <u>or on behalf of the claimant</u> to the contractor against whom the claim is filed." (emphasis added)).

Additionally, the statute provides that "an <u>owner</u> 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) (emphasis added). An "owner" is defined as "a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." Md. Code Ann., Bus. Reg. § 8-101(k). There is no dispute that the Claimant is the owner of the home in question; thus, she is eligible to recover from the Fund no matter the source of funds that paid the Respondent.

As a result of my findings, I will calculate the Claimant's "actual loss" in accordance with COMAR 09.08.03.03B(3)(c). Using that formula, the computation is as follows:

Amount paid to the Respondent:	$31,451.00
Plus amount payable to repair and replace:	<u>$3,647.00</u>
Total:	**$35,098.00**
Minus Contract price	<u>$31,451.00</u>
Actual Loss:	**$3,647.00**

The Claimant demonstrated an "actual loss" of $3,647.00. Md. Code Ann., Bus. Reg. § 8-401. Her "actual loss" is less than $20,000, thus her award is not limited by section 8-405(e)(1). Additionally, the Respondent was paid a sum greater than her actual loss, thus her award is also not limited by section 8-405(e)(5). Accordingly, the appropriate award is $3,647.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss $3,647.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a) and (c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $3,647.00; 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;[3] and

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

Signature on File

September 20, 2016
Date Decision Issued

Tara K. Lenner
Administrative Law Judge

TKL/sw
#164072

[3] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of December, 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.

Andrew Snyder

Andrew Snyder
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION