

IN THE MATTER OF THE CLAIM
OF STEVEN F. SULLIVAN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JACK WALKER,
T/A HOME PRO ROOFING &
REMODELING, L.L.C.,
RESPONDENT

* BEFORE THOMAS G. WELSHKO,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-02477
* MHIC No.: 17 (90) 530
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 1, 2016, Steven F. Sullivan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,014.00 in alleged actual losses suffered as a result of a home improvement contract with Jack Walker, t/a Home Pro Roofing & Remodeling, L.L.C. (Respondent).

I held a hearing on June 6, 2017 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Andrew J. Brouwer, Assistant Attorney General, Department of Labor,

Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing in the Respondent's absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing 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 & Supp. 2016); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted thirteen exhibits on the Claimant's behalf, and ten exhibits on the Fund's behalf. I did not admit any exhibits on behalf of the Respondent, because he did not attend the hearing. (I have attached a complete Exhibit List as an Appendix to this decision.)

Testimony

The Claimant testified on his own behalf. The Fund did not offer 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 license number 01-102337.

2. On February 20, 2015, the Claimant purchased a coupon from Angie's List, which gave the Claimant the opportunity to have the Respondent install a new roof on his Baltimore, Maryland home for \$5,499.00.

3. The Claimant purchased the coupon from Angie's List using his credit card. Angie's List, in turn, accepted that payment and forwarded the funds that it received from the Claimant to the Respondent.

4. Pursuant to his arrangement with Angie's List, on February 24, 2015, the Claimant entered into a contract with the Respondent to have a new roof installed on his home for \$5,499.00.

5. The Respondent installed a new roof at the Claimant's home on May 4, 2015.

6. In February 2016, the Claimant began to notice signs of water leakage around the chimney in his home's finished attic. The Claimant called the Respondent and alerted one of his representatives about the problem, noting that the Respondent's work was still within the warranty period.

7. A representative of the Respondent came to the Claimant's home and inspected the area where the Claimant identified leakage. He agreed there was damage caused by the leakage and promised to make the necessary repairs to correct the problem.

8. On March 8, 2016, the Respondent returned to the Claimant's home and made repairs to the roof.

9. Because the Claimant believed that the Respondent had corrected the leakage problem, on March 24, 2016, he hired L.M.L. Remodeling to repair interior drywall damage in the attic ceiling around the chimney caused by the roof leakage. The Claimant decided not to paint at this time.

10. On September 19, 2016, L.M.L. Remodeling returned to paint the attic. L.M.L. Remodeling's president, Larry Lathe, told the Claimant that he should keep an eye on the repaired area and the chimney itself, because he saw further signs of leaking and water seepage.

11. Shortly after Mr. Lathe's visit, a heavy rainstorm caused water leakage into the Claimant's finished attic in and around the chimney, where it had occurred six months earlier; the presence of that leak revealed that the Respondent had not corrected the water infiltration problem.

12. When the Claimant called the Respondent to alert him that he had not resolved the leakage problem, the Claimant discovered that the Respondent's telephone had been disconnected. He also discovered that Angie's List had removed the Respondent from its list of approved contractors and that Owens Corning, the supplier of the Respondent's roofing materials, had done likewise.

13. When the Claimant contacted Owens Corning, the representative with whom he spoke recommended Brothers Services Company (Brothers Services) as one of Owens Corning's preferred roofing contractors to fix whatever problems the Claimant was still having with his roof.

14. At the suggestion of the Owens Corning representative, the Claimant called Brothers Services. On October 4, 2016, a Brothers Services representative, Josh Denning, inspected the Respondent's roof installation and discovered deficiencies.

15. The deficiencies stemming from the Respondent's improper installation of the Claimant's roof consisted of step flashing on the chimney that was sliding down and counter flashing was not properly cut into the mortar joints.

16. On October 4, 2016, the Claimant entered into a \$3,014.00 contract with Brothers Services to make repairs to his roof to correct the leakage problem resulting from the Respondent's poor workmanship.¹

17. The October 4, 2016 contract also included the replacement of three missing or broken slate shingles on the Claimant's detached garage (with the slate to be provided by the Claimant). That work was not included in the Claimant's contract with the Respondent.

18. After Brothers Services made repairs to the roof of the Claimant's residence in October 2016, the leakage stopped.

19. On March 3, 2017, the OAH mailed a Notice of Hearing (Notice) to the Respondent at his address of record on file with the MHIC by regular and certified mail. The U.S. Postal Service returned the certified mailing to the OAH on April 4, 2017, with the notation, "Return to Sender – Unclaimed – Unable to Forward." The U.S. Postal Service did not return the Notice sent by regular mail.

20. The Claimant's actual loss is \$2,411.20.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).² "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

¹ Brothers Services is an MHIC-licensed home improvement contractor. (Fund. Ex. 10.)

² As noted above, "COMAR" refers to the Code of Maryland Regulations.

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);³ *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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Because the Respondent failed to appear, I will first address whether he received proper notice of the hearing. On March 3, 2017, the OAH mailed a Notice of Hearing (Notice) to the Respondent at his address of record on file with the MHIC by regular and certified mail. COMAR 09.08.03.03A(2). The MHIC also verified the Respondent's address through search of the records of Maryland's Motor Vehicle Administration. (Fund Ex. 5.) The U.S. Postal Service returned the certified mailing to the OAH on April 4, 2017, with the notation, “Return to Sender – Unclaimed – Unable to Forward.” The U.S. Postal Service did not return the Notice sent by regular mail. Because the OAH sent its Notice to the Respondent by regular mail at his last known address, despite the return of the certified mailing, I determined that the OAH's Notice was reasonably designed to inform the Respondent of the time, date and place of the hearing. *Golden Sands Club Condominium, Inc. v. Waller*, 313 Md. 484, 503–04 (1988). Therefore, I concluded that the OAH's Notice was proper and directed that the hearing proceed in the Respondent's absence.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The property that was the subject of the contract is located in Maryland, and it is occupied by the Claimant. No *prima facie* impediment exists that would bar the Claimant from receiving reimbursement from the Fund for the Respondent's acts and omissions (being related to the Respondent or one of his employees, recovering losses from another source, etc.).

The facts are undisputed here. On February 20, 2015, the Claimant purchased a \$5,499.00 coupon from Angie's List that entitled him to have roofing work done at his home by the Respondent. Four days later, the Claimant entered into a contract with Respondent to have roofing work performed on his home for the coupon price. (It seems that Angie's List acted as a broker or conduit to receive payments from homeowners through coupon purchases, which it then funneled to participating contractors, such as the Respondent.) The Respondent installed a new roof on the Claimant's home on May 4, 2015.

In March 2016, a little less than a year after the Respondent installed the new roof, the Claimant began noticing water leakage in the area surrounding the chimney. That leakage ruined the drywall ceiling in the Claimant's finished attic. The Claimant contacted the Respondent in an effort to have him address that leakage problem. The Respondent's efforts to correct the leakage failed. In September 2016, a heavy rainstorm once again caused areas around the chimney of the Claimant's home to leak. When the Claimant attempted to call the Respondent to alert him that the leakage problem persisted, he discovered that the Respondent had closed his business. He made additional attempts to reach the Respondent, but could not locate him.

Through the process of attempting to locate the Respondent, the Claimant spoke with a representative of Owens Corning, the Respondent's materials supplier. In response to the Claimant's query concerning how he might have his roof repaired, that representative

recommended Brothers Services as one of Owens Corning's preferred contractors. A Brothers Services representative came to the Claimant's home on October 4, 2016. When that representative, Josh Denning, inspected the Claimant's roof, he discovered that the Respondent had installed flashing poorly in and around the chimney, which was the source of the water leakage into the Claimant's home. The failure of the Respondent to install flashing around the chimney properly constitutes poor workmanship.

Convinced that Brothers Services was competent to repair his roof, the Claimant entered into a \$3,014.00 contract with that entity to perform work necessary to stop the leakage around his chimney. When he testified, however, the Claimant noted that his contract with Brothers Services also included the replacement of three broken or missing slate shingles on his garage roof (with the slate supplied by the Claimant). (Claimant Exhibit Nos. 8 and 10.) The Claimant's contract with the Respondent did not include any work associated with his garage roof; it concerned only the main residence. The Brothers Services contract did not separate the cost of repairing the Respondent's work from the cost of installing new slate shingles on the Claimant's garage roof.

During closing argument, the Fund acknowledged that the Claimant had sustained an actual loss. According to the Fund, not only did the Claimant observe water infiltrating through the chimney area during the heavy rainstorm, but after Brothers Services performed repairs to the Claimant's roof, all leakage stopped. The Fund noted that the cessation of leakage after Brothers Services completed repairs on the Claimant's roof circumstantially suggests that the Respondent's poor installation techniques caused the leakage. Even so, the Fund asserts that because the installation of the slate shingles on the Claimant's garage was not part of the Claimant's contract with Respondent, I must adjust the cost to repair the Respondent's poor workmanship. The Fund did not recommend any adjustment amount.

I agree with the Fund that I must adjust the Brothers Services \$3,014.00 contract price to determine a more accurate cost of repair. Obviously, the Claimant sustained an actual loss, because he had to spend money to fix problems associated with the Respondent's poor workmanship. Yet, I cannot use the full amount that Brothers Services charged the Claimant, because it included work not contemplated in the Claimant's original contract with Respondent. This situation poses a dilemma. In theory, I could recommend denial of the Claimant's claim in its entirety, because the Brothers Services' contract does not provide an accurate measure of the Claimant's cost to repair the Respondent's poor work under the February 24, 2015 contract.

I do not believe denying the Claimant's claim in its entirety would be appropriate, though, given that the Claimant definitely had to pay Brothers Services a substantial sum to correct deficiencies arising out of the Respondent's substandard roof installation. Therefore, I have subtracted twenty percent from the Brothers Services' contract price to account for the work on the Claimant's garage roof that was not contemplated in the Claimant's contract with the Respondent. Twenty percent of \$3,014.00 is \$602.80. Consequently, I have determined that the reasonable cost to correct the Respondent's deficiencies is \$2,411.20 ($\$3,014.00 - \$602.80 = \$2,411.20$).

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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

COMAR 09.08.03.03B(3)(c).

Here, the Claimant paid \$5,499.00 to the Respondent to install a new roof on his home. As noted above, I determined that a reasonable cost to repair the Respondent's poorly done work is \$2,411.20. Consequently, I have performed the following calculations to compute the Claimant's actual loss:

\$5,499.00	Amount paid by the Claimant to or in behalf of the Respondent
<u>+2,411.20</u>	Reasonable cost of repair
\$7,910.00	
<u>-5,499.00</u>	Original contract price
\$2,411.20	Actual loss by the Claimant

Accordingly, the Claimant is entitled to reimbursement of \$2,411.20. Md. Code Ann., Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(3)(c).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,411.20 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)(c).

RECOMMENDED ORDER

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

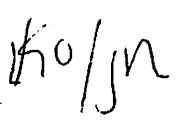
ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,411.20; and

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 ten percent as set by the Maryland Home Improvement Commission;⁴ and

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

Signature on File

August 28, 2017
Date Decision Issued



Thomas G. Welshko
Administrative Law Judge

TGW/sw
#169485

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of October, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION