

IN THE MATTER OF THE CLAIM
OF TONYA FAULKNER,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JACK WALKER,
T/A HOME PRO ROOFING &
REMODELING LLC,
RESPONDENT

* BEFORE EMILY DANEKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-17-02468
* MHIC No.: 17 (05) 88¹
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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 October 25, 2016, Tonya Faulkner (Claimant) filed a claim (Claim) with the Home Improvement Guaranty Fund (Fund) seeking reimbursement of \$905.50 in alleged actual losses suffered as a result of a home improvement contract with Jack Walker, trading as Home Pro Roofing & Remodeling LLC (Respondent). On or about January 4, 2017, the Maryland Home Improvement Commission (MHIC), which administers the Fund, issued a Hearing Order

¹ On the Home Improvement Claim Form, the claim is identified as claim number 17 (75) 88. On all other documents, the claim is identified by the number 17 (05) 88; accordingly, I use this number.

referring the case to the Office of Administrative Hearings (OAH) for a hearing to allow the Claimant an opportunity to establish eligibility to recover from the Fund.

I held the hearing in this matter on May 5, 2017, at the OAH's office in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).² The Claimant represented herself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Neither the Respondent, nor anyone authorized to represent him, appeared for the hearing as scheduled. After waiting an additional fifteen minutes, I proceeded in the Respondent's absence.

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); Code of Maryland Regulations (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

The Fund offered the following exhibits, which were admitted into the record:³

Fund Ex. 1 – Hearing Order, dated January 4, 2017

Fund Ex. 2 – Notice of Hearing, dated February 8, 2017

² Unless otherwise indicated, all references to the Business Regulation Article are to the 2015 version.

³ The Fund pre-marked its exhibits with the preface, "GF"; for consistency with the party designations, I refer to them here with the preface, "Fund."

Fund Ex. 3 – Affidavit of Kevin Niebuhr, dated April 28, 2017, with attached Maryland Motor Vehicle Administration (MVA) printout, dated April 27, 2017

Fund Ex. 4 – Letter from Joseph Tunney, Chairman of the Maryland Home Improvement Commission, to Respondent, dated October 25, 2016, with attached Home Improvement Claim Form, dated October 24, 2016

Fund Ex. 5 – Respondent’s Licensing Record, printed April 27, 2017

The Claimant offered the following exhibits, which were admitted into the record:

Clmt. Ex. 1 – Emails between Claimant and Respondent, dated between April 1, 2016 and June 30, 2016

Clmt. Ex. 2 – Contracts, dated June 3, 2016

Clmt. Ex. 3 – Online receipt, dated June 3, 2016 (\$655.50)

Clmt. Ex. 4 – Online receipt, dated June 3, 2016 (\$250.00)

Clmt. Ex. 5 – Bank Statement, dated June 30, 2016

There were no exhibits submitted on behalf of the Respondent.

Testimony

The Claimant testified in her own behalf. There were no other witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 102337.
2. At all relevant times, the Claimant was the owner of a home located at 20202 Spring Haven Court in Montgomery Village, Maryland (Residence). This is the Claimant’s primary residence.
3. On June 3, 2016, the Claimant and Respondent entered into two related contracts for the removal and replacement of the roof and gutters at the Residence.

4. The agreed-upon contract price for the roof work was \$1,966.50. The agreed-upon contract price for the gutter work was \$750.00.

5. The contracts each required the Claimant to make a down payment at the time of contracting in the amount of one-third of the contract price.

6. On June 3, 2016, the Claimant paid the Respondent the required down payments in the amounts of \$655.50 and \$250.00.

7. The contracts did not specify a date for the work to begin.

8. On or about June 10, 2016, the Claimant contacted the Respondent to schedule the work; she received no response and on June 14, 2016 she sent the Respondent an email seeking to schedule the work.

9. On or about June 14, 2016, the Claimant and Respondent scheduled the roof and gutter work to take place on June 27, 2016.

10. On the morning of June 27, 2016, a subcontracted work crew arrived at the Residence and began setting up ladders and tarps. The Claimant left for work around 7:30 a.m., approximately fifteen minutes after the crew arrived.

11. When the Claimant returned to the Residence at approximately 12:50 p.m. that same day, the crew, ladders, and tarps were gone, and no work had been done at the Residence.

12. The Claimant placed multiple calls to the Respondent that same afternoon, June 27, 2016; there was no answer and the Respondent did not reply to a message the Claimant left on his voicemail. The Claimant also sent the Respondent an email that same day stating that no work had been done on the roof or gutters and inquiring about the status of the job; he did not respond.

13. The Claimant placed calls to the Respondent on June 28 and 29, 2016; she received no response to messages she left for the Respondent.

14. The Claimant emailed the Respondent on June 30, 2016, again stating that no work was done at her home and requesting that he contact her about the job. The Respondent did not respond to the email.

15. The Claimant is not a relative or employee, officer, or partner of the Respondent; she is not related to an employee, officer, or partner of the Respondent.

16. The Claimant has not filed any other action against the Respondent and has not filed an insurance claim regarding her loss.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to “the business address of the licensee on record with the Commission.” Md. Code Ann., Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Md. Code Ann., Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

The MHIC’s business address of record for the Respondent is 2144 Priest Bridge Court, #7, in Crofton, Maryland;⁴ the Respondent provided this address to the MHIC on February 4, 2016. (Fund Ex. 5 at 2.) Strictly speaking, notice of the instant hearing should have been sent to this address, as the business address of record, but it was not. The Fund explained that in August 2016, certified and first-class mailings that it sent to the Respondent at the Priest Bridge Court address were returned as “undeliverable, unable to forward.” Thus, it is apparent that, although

⁴ The MHIC’s records list this as both the home and trade address for the Respondent. (Fund Ex. 5 at 1, 2.)

this is the Respondent's address of record, notices sent to the address were undeliverable and did not reach the Respondent.

In an attempt to provide actual notice to the Respondent, in April 2017, an MHIC investigator obtained the Respondent's personal address from the MVA. (Fund Ex. 3.) The MVA's records identify the Respondent's address as 902 Eastham Court, Apartment T4, in Crofton, Maryland, and that he provided this address to the MVA on November 2, 2016.⁵ (Fund Ex. 3.) The Respondent is obligated to keep the MHIC apprised of his current address; he did not do so. *See* Md. Code Ann., Bus. Reg. § 8-309 (requiring a licensee to notify the MHIC of a change of address within ten days). Notice of the hearing was sent to the Respondent at the Eastham Court address on February 8, 2017, by certified and regular mail; the certified mailing was returned as "unclaimed, unable to forward," the regular mailing was not returned.

The method of giving notice to the Respondent was reasonably calculated to provide him with notice of the hearing. In these circumstances, I concluded that proper notice of the hearing was provided. Therefore, the hearing proceeded in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h).

II. Merits of the Claim

Relevant Law

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to "recover compensation from the Fund for an actual loss that results

⁵ The MHIC's records in evidence reflect the Priest Bridge Court address as the Respondent's business address of record (Fund Ex. 5 at 1); there was no evidence that the MHIC formally updated its records to reflect the Eastham Court address as the Respondent's official address. The Fund attempted to correspond with the Respondent at another address as well, 407 Craney Creek Road in Stevensville, Maryland, without success.

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 statutes and regulations governing the Fund define “actual loss” as “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.

In addition to limitations on the amount and type of loss that can be recovered,⁶ certain claimants are excluded from recovering from the Fund. In this regard, the Fund may pay a claim only if: (a) the claimant resided in the home at issue or owned fewer than three residences; (b) the claimant was not an employee, officer or partner of the contractor and was not related to the contractor or the contractor’s employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) any remedial work was done by licensed contractors; (f) the claimant 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 (h) the claimant filed the claim with the MHIC within three years of the date the claimant knew of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1) and (2).

At a hearing on a claim, a claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3). The claimant’s burden is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217; *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). 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*

⁶ *See* Md. Code Ann., Bus. Reg. § 8-405(e)(1), (3), (5); COMAR 09.08.03.03B(1).

County Police Dep't, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

The Claimant Sustained an Actual Loss from an Incomplete Home Improvement

The evidence plainly establishes that the Respondent contracted to provide home improvements at the Residence and accepted money from the Claimant, but did not perform the work. The Claimant testified that the Respondent was to remove and replace her home's roof and gutters and she submitted the signed contracts with Respondent, which further describe the work to be performed, specify the contract prices, and provide for a one-third down payment. The Claimant testified that on June 3, 2016, she made two payments over the phone to the Respondent, in the amounts of \$655.50 and \$250.00; she supported this testimony with online receipts and a bank statement.

In support of her position that the work was not performed, the Claimant testified that a subcontracted work crew arrived on the morning of June 27, 2016, but when she arrived home from work that afternoon, she could tell from the street-level that no work had been performed. The Claimant observed the worn shingles still in place, she noted a satellite dish that was to be removed still remained, and she could see the gutters were her old ones. The Claimant further noted that there was no debris in the yard and no documentation was left by the work crew. The Claimant promptly attempted to call the Respondent and received no response. That very day, she emailed the Respondent explaining that the work crew had not performed the roofing and gutter work and requesting a response. Although the Respondent previously communicated with the Claimant using the same email address, the Respondent did not reply to this email. The Claimant again emailed the Respondent on June 30, 2016, noting the work was not performed

and that she had repeatedly attempted to reach him. The Claimant submitted her email correspondence with the Respondent as support for her testimony.

The Claimant was the only witness; she was detailed and thorough in her testimony and I found her to be credible. Moreover, the Claimant supported her testimony with documents. Notably, the emails demonstrate that the Claimant has been consistent in her assertion that the work was not performed and that she raised this issue immediately with the Respondent. This prompt and consistent report lends additional credibility to her testimony. The Respondent, by contrast, consistently refused to respond to the Claimant--one would expect a prompt denial from the Respondent if, in fact, the work had been performed.

I find that the Respondent provided an incomplete home improvement by failing to perform the roofing and gutter work at the Residence. The licensing history provided by the Fund establishes that the Respondent was a licensed home improvement contractor at the time he entered into the contracts with the Claimant. (*See* Fund Ex. 5 at 3.) Thus, the Claimant has an eligible claim.

Turning to the amount of the actual loss, the applicable law provides three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). Of those three formulas, the following formula offers the appropriate measurement to determine the amount of the Claimant's actual loss:

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.

COMAR 09.08.03.03B(3)(a). The Claimant paid the Respondent \$905.50 (or, \$655.50 + \$250.00) and the Respondent performed no work on the contracts. Thus, the Claimant's

actual loss is \$905.50. This amount does not exceed the statutory cap on recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1).

The Claimant is not an Excluded Claimant.

The evidence establishes that the work was to be performed on the Claimant's primary residence, an existing dwelling in Montgomery Village, Maryland. The Claimant is not a relative of the Respondent, she is not the Respondent's employee, officer, or partner and she is not related to any of the Respondent's employees, officers, or partners. Neither of the contracts at issue contains an arbitration clause. The Claimant has not filed any other action to recover for the Respondent's acts or omissions.

The Claimant promptly and repeatedly contacted the Respondent about his failure to perform the roofing and gutter work at the Residence. The Respondent failed to respond to any of the phone calls, voicemail messages, and emails left by the Claimant between June 27 and June 30, 2016. The Claimant has not had any contact with the Respondent since June 14, 2016. The evidence is clear and undisputed that the Claimant did not reject good faith efforts by the Respondent to resolve the claim. Having no response from the Respondent, the Claimant timely filed her claim with the Fund on October 24, 2016.

Thus, the Claimant is not statutorily prohibited from recovering from the Fund for her actual loss. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$905.50, the amount actually paid to the Respondent.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$905.50 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03A(3), B(3)(a).

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$905.50; 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 (10%) as set by the Maryland Home Improvement Commission;⁷ and

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

Signature on File

July 21, 2017
Date Decision Issued


Emily Daneker
Administrative Law Judge

ED/da
#168973

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

CONFIDENTIAL

1. The purpose of this document is to provide a comprehensive overview of the project's objectives and scope.

2. The project is designed to address the current challenges faced by the organization in the market.

3. The project will be completed by the end of the fiscal year.

4. The project team consists of experienced professionals from various departments.

5. The project budget is estimated to be within the allocated resources.

6. The project will be monitored and reported on a regular basis.

7. The project is subject to change based on market conditions.

8. The project is a high priority for the organization.

9. The project is a key strategic initiative.

[Handwritten signature]
Project Manager

[Handwritten signature]
Senior Director

Date: _____

PROPOSED ORDER

WHEREFORE, this 21st day of August, 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.

Joseph Tunney

Joseph Tunney

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION