

IN THE MATTER OF THE CLAIM OF	*	BEFORE STUART G. BRESLOW
JASON COPEN	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE VIOLATIONS OF	*	OAH NO.: DLR-HIC-02-07-24188
DAVID B. BARKLEY, T/A	*	MHIC NO.: 06 (75) 620
OMEGA CONSTRUCTION &	*	
REMODELING	*	
* * * * *		

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On January 28, 2007, Jason Copen (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$12,156.00 for actual losses suffered as a result of home improvement work performed by David B. Barkley, trading as Omega Construction & Remodeling (Respondent).

I conducted a hearing on December 10, 2007 at the Office of Administrative Hearings (OAH) in its office located in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004). Mathew A. Lawrence, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the MHIC Fund. The Claimant represented

himself. The Respondent failed to appear after proper notice of the hearing was sent to him by regular and certified mail at his address of record. The regular mail notification was not returned by the United States Postal Service and the certified mail delivery was returned because it was unclaimed by the Respondent. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02.01; and 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?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Fund submitted the following exhibits, which I admitted into evidence:

- Fund Ex. 1. License Information for the Respondent, dated December 10, 2007
- Fund Ex. 2. Home Improvement Claim Form, dated February 3, 2007

The Claimant submitted the following exhibit and attachments, which I admitted into evidence:

- Cl. Ex. 1. Chronological Summary of the claim, dated December 9, 2007
  - Attachment #1. Contract between Chris Kirby & Jason Copen and Omega Construction & Remodeling, dated April 24, 2004
  - Attachment #2. Undated photograph of wet spot on the ceiling
  - Attachment #3. Letter from Chris Kirby to Respondent, dated November 3, 2004

Attachment #4. Copies of checks to Respondent for the total amount of the contract price of \$113,170.00

Attachment #5. Series of emails from Claimant to Respondent and from Respondent to Claimant, during August 2005

Attachment #6. Email from Respondent to Claimant and Claimant to Chris Kirby, both dated September 7, 2005

Attachment #7. Email referencing MHIC complaint #620-2006 between the Respondent and Claimant, dated November 1, 2005 and from Chris Kirby to Respondent, dated October 28, 2005

Attachment #8. String of emails between Respondent and Claimant during the period of October 28, 2005 through November 8, 2005 referencing MHIC complaint #620-2006. Undated contract with Insulators of Maryland and Chris Kirby, for the replacement and installation of a new roof; proposal from S&K Roofing and Siding Windows, dated November 14, 2005; proposal from P.J. McTavish & Co., Inc. dated November 9, 2005

Attachment #9. Letter from Edwardo Camacho to OAH, dated September 28, 2007 and copies of checks from the Claimant payable to Edwardo Camacho

Attachment #10. Series of emails between Chris Kirby and Respondent regarding roof leaks during October 2005 and photographs numbered P01 through P13

### Testimony

The Claimant testified and presented the testimony of Chris Kirby, co-owner of the residence where the Project was to be performed, on his behalf.

The Fund did not present any witnesses.

### **FINDINGS OF FACT**

Having considered all of the evidence presented, 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 license number 01-70346.

2. The Notice of Hearing was sent to the Respondent by certified and regular mail on August 29, 2007. The certified letter was returned "Unclaimed."

3. On April 24, 2004, the Claimant and the Respondent entered into a contract to design and build an addition and an office for the Claimant's home. (Project). The total price for the Project was \$120,350.00; however, certain deductions were agreed upon bringing the final total price to \$113,170.00. The Claimant paid the final price in full to the Claimant.

4. The Project included replacing and installing a new thirty year architectural roof. Work on the entire project began in July 2004 and the roofing portion of the project was completed in September 2004 by a subcontractor for the Respondent.

5. In October 2004, the Claimant noticed water spots on the ceiling of the bedroom of the newly completed Project and brought the problem to the attention of the Respondent. The Respondent sent a representative of his roofing subcontractor to inspect the situation; however, he visited the Project at night and was denied entry to the Claimant's home.

6. On August 5, 2005, the Respondent sent an email to the Claimant acknowledging that the roof needed to be replaced, and on August 22, 2005, the Claimant sent another email to the Respondent indicating that the roof replacement was a top priority.

7. The Claimant provided the Respondent with a reasonable deadline to have the roof replaced, but the Respondent did not replace the roof within the deadline, despite

the involvement of a representative of MHIC who was trying to provide assistance in resolving the dispute between the parties.

8. The Claimant selected three contractors to provide proposals to replace the roof and finally selected Insulators of Maryland, Inc., whose proposal was for \$12,156.00.

9. The roof was replaced by Insulators of Maryland Inc., and the Claimant paid the contract price of \$12,156.00 in full on December 21, 2005.

### **DISCUSSION**

A threshold question in this case is whether the Respondent received timely notice of the hearing. If the Respondent was properly notified of the hearing, the case could proceed in his absence.

A Notice of Hearing was mailed to the Respondent by certified and regular mail on August 29, 2007, to the address which the MHIC had on record for the Respondent (Fund. Ex. 1). On October 5, 2007, the OAH received the certified mailing receipt "green card" indicating that the certified letter was being returned "Unclaimed." Additionally, the Notice of Hearing mailed by regular mail was not returned to the OAH, indicating its delivery.

I find that the OAH sent the Notice of Hearing to the address reasonably calculated to give the Respondent notice of this hearing. The Respondent was given adequate notice to appear at the hearing. Accordingly, I considered that the Respondent failed to appear and the case properly could proceed in his absence, adequate notice having been given. *See Border v. Grooms*, 267 Md. 100 (1972) (the "mailbox rule").

Section 8-405(a) of the Business Regulation Article provides that an owner may recover compensation from the Fund, "for an actual loss that results from an act or omission 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 (2004).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney’s fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(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 under 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.

The burden of proof to establish a valid claim against the Fund rests with the Claimant.

Md. Code Ann., Bus. Reg. § 8-407(e) (2004). Additionally, a contractor found to have caused an actual loss must reimburse the Fund for any money it has paid to compensate a claimant or claimants for that loss, plus annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-410 (a)(1)(iii)(2004).

There is overwhelming evidence to establish that the Claimant has suffered an actual loss as a result of the unworkmanlike performance of the Respondent's subcontractor in installing the roof on the Project. The Claimants entered into a contract with the Respondent in good faith for the construction of the Project. The Respondent did not directly install the roof, but rather subcontracted with a roofing company to install the roof. Shortly after it was installed, the Claimant noticed water spots on the ceiling below the new roof. Over the ensuing months, more leaks appeared, resulting in damage to the interior of the Project.

A representative of the Respondent, Jeff Bounds, advised that the only long term solution was to have the roof replaced and that he relayed this information to the Respondent's office. After providing the Respondent several more months to locate and secure a contractor to replace the roof and after receiving assurances from the Respondent that a new roofing company would be hired by the Respondent to replace the roof, the Respondent failed to replace the roof.

A deadline of November 2, 2005 was proposed after a telephone discussion with the parties and a representative of MHIC, Mr. Hardy. They collectively agreed that, if the Respondent failed to perform the roof replacement by November 2, 2005, then the Claimant would seek other qualified licensed contractors to replace the roof and make a claim for the cost of replacement with the MHIC. The Respondent failed to meet the deadline, and the Claimant proceeded to remediate the situation.

The Claimant selected three licensed contractors to submit proposals to perform the roof replacement. He selected Insulators of Maryland, Inc. to do the work for the price of \$12,156.00. The work was completed and the contract price was paid in full.

The Fund agreed that the initial roof installation, performed by the subcontractor for the Respondent, was inadequate and unworkmanlike and that replacement of the roof was necessary.

Having met its burden of proof by a preponderance of the evidence that the work performed by the Respondent was inadequate and unworkmanlike, the only element remaining to be determined is the amount of the award the Claimant is entitled to receive from the Fund. The amount of any award from the Fund is limited to no more than \$15,000.00 to one claimant for the acts of one contractor and no more than \$100,000.00 to all claimants for the acts of one contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2004).

In applying the formula for calculating actual loss under COMAR 09.08.03.03B(3)(c), the Claimant paid \$113,170.00 to the Respondent under the original contract. Added to this figure is the amount that the Claimant paid to have the roof replaced. The total amount for the roof replacement was \$12,156.00 (Clt. Ex. 1, Attachment 8). These two figures are added together for a total of \$126,326.00. From this total amount, the original contract price of \$113,170.00 is subtracted, leaving a total claim amount of \$12,156.00, which is the same figure that was calculated by the Fund and recommended by the Fund to be paid to the Claimant.

By breaching his contract with the Claimant, the Respondent violated Md. Code Ann., Bus. Reg. § 8-605 (2004). He failed to install the roof in a workmanlike manner. In so doing, he became liable for the Claimant's cost of replacing the roof under Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2004).

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual loss of \$12,156.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).



**PROPOSED ORDER**

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


**ORDER** that the Claimant be awarded \$12,156.00 from the Maryland Home Improvement Guaranty Fund; and

**ORDER** that the Respondent be 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 as set by the Commission, Md. Code Ann., Bus. Reg. § 8-411 (2004); and

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

February 29, 2008  
Date Decision Mailed

SGB/rds  
# 95106

  
Stuart G. Breslow  
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF \* BEFORE STUART G. BRESLOW  
 JASON COPEN \* AN ADMINISTRATIVE LAW JUDGE  
 AGAINST THE MARYLAND HOME \* OF THE MARYLAND OFFICE  
 IMPROVEMENT GUARANTY FUND \* OF ADMINISTRATIVE HEARINGS  
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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 1st day of April 2008, 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**