

IN THE MATTER OF THE	* BEFORE ROBERT F. BARRY,
CLAIM OF JANET FRIED,	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED VIOLATIONS	* OAH No.: DLR-HIC-02-15-01500
OF WILLIAM KING,	* MHIC No.: 14(90)894
LIC. No.: 01-100263	*
AND	*
DREAM CASTLE PAINTING AND	*
HOME IMPROVEMENT, LLC	*
LIC. No. : 05-127577	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On November 18, 2014, Janet A. Fried (Claimant) filed a claim with the Maryland Home Improvement Commission’s (Commission) Guaranty Fund (Fund) for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract with William King

(Respondent).¹ On January 7, 2015, the Commission issued a Hearing Order, and on January 12, 2015, the Commission transmitted the case to the Office of Administrative Hearings (OAH).

On May 14, 2015, I held a hearing at the OAH, 10400 Connecticut Avenue, Suite 205, Kensington, Maryland 20646. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(a) and (c)(2)(i) (2015). The Claimant represented herself. The Respondent did not appear. Kris King, Assistant Attorney General, Department of Labor, Licensing, and Regulation, represented the Fund.

The contested-case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); and the Rules of Procedure of the OAH, Code of Maryland Regulations (COMAR) 28.02.01, govern procedure in this case.

ISSUE

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions?

SUMMARY OF EVIDENCE

Exhibits

The Claimant submitted six exhibits that I admitted into evidence:

CLAIM #1 - Proposal and Acceptance, October 20, 2013

CLAIM #2 - Canceled checks, October 23, 2013; December 16, 2013; and December 26, 2013

CLAIM #3 - Inspection Report, ThoroSpec, LLC, December 30, 2013

CLAIM #4 - A-B - Photographs of wallpaper and drywall;

C-P - Photographs of roof

¹ The Respondent is also the individual in responsible charge of home improvement work performed by Dream Castle Painting and Home Improvement, LLC (Dreamcastle), which is licensed by the Commission as a corporate home-improvement contractor under registration number 05-127577. (FUND #3). The contract in this case was written on the letterhead of Bill King Home Improvements, but listed Dreamcastle's corporate license number. (CLAIM #1). Ultimately, the Respondent is the responsible party in this case either under his individual license or as the individual in responsible charge of Dreamcastle's home improvement work

CLAIM #5 - Estimate, Central Roofing, Siding & Windows Co., March 12, 2014

CLAIM #6 - Diagram of the interior of the Claimant's home, Capitol Termite & Pest Control

The Respondent did not appear; therefore he did not submit any exhibits.

The Fund submitted five exhibits that I admitted into evidence:

FUND #1 - Memorandum, May 6, 2015, from the OAH to the Commission, with Certified Mailing of Notice of Hearing and Hearing Order to the Respondent, with a notice from the United States Postal Service (USPS) marked "Refused" and USPS Tracking history

FUND #2 - Hearing Order, January 6, 2015

FUND #3 - Respondent's licensing history with the Commission, May 12, 2015

FUND #4 - Home Improvement Claim Form, November 18, 2014

FUND #5 - Letter, November 20, 2014, from the Commission to the Respondent

Testimony

The Claimant testified on her own behalf. She also presented testimony from Hollis Brown, who testified as an expert in home inspection.

The Respondent did not appear; therefore, he did not testify.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. The Respondent is licensed as an individual home improvement contractor by the Commission under registration number 01-100263. The most recent registration period is from September 5, 2013 through September 5, 2015. (FUND #3).

2. The Respondent is also the individual in responsible charge of home improvement work performed by Dream Castle Painting and Home Improvement, LLC, which is licensed by

the Commission as a corporate home-improvement contractor under registration number 05-127577. (FUND #3).

3. At all times relevant to this case, the Claimant lived at 38 Eldwick Court, Potomac, Maryland 20854.

4. For approximately two years before October 2013, the Claimant noticed that wall covering in her foyer and family room was damp and peeling and cracking.

5. The Claimant consulted with several roofing and siding companies to determine the source of the dampness, but she was told that there were no apparent problems with either the roof or the siding.

6. Mr. Brown is licensed as a home inspector by the Maryland Commission of Real Estate Appraisers, Appraisal Management Companies, and Home Inspectors. He has approximately twenty years of experience in home inspection. He has taught home inspection and he is the owner of ThoroSpec LLC, a home inspection company.

7. On October 2, 2013, Mr. Brown conducted an interior and exterior inspection of the Claimant's home, but he also could find no apparent problems with either the roof or the siding. Mr. Brown recommended that the Claimant have portals cut into the walls of the foyer and family room to further investigate the source of the moisture. (CLAIM #3).

8. The Claimant had the Respondent cut a portal into the wall of her family room. The Respondent told the Claimant's husband that there was evidence of water leaking into the wall from the area of the roof. The Respondent recommended that the Claimant replace the front lower-level portion of her roof.

9. On October 20, 2013, the Claimant and the Respondent entered into a home-improvement contract to have the Respondent: (a) replace the existing shingles on the front

lower-level portion of the Claimant's roof for \$3,900.00; (b) install an ice shield membrane underlayment on the roof replacement for \$950.00; and (c) repair and paint damaged drywall for \$525.00. (CLAIM #1).

10. On October 23, 2013, the Claimant paid the Respondent a deposit of \$1,800.00. (CLAIM #2).

11. Between December 5 and 16, 2013, the Respondent installed the new roofing on the Claimant's home.

12. On December 16, 2013, the Claimant paid the Respondent \$1,800.00, and, on December 26, 2013, she paid the Respondent \$1,250.00. (CLAIM #2).

13. On December 26, 2013, the Respondent cut additional portals into the walls of the foyer and family room. The Claimant had the Respondent hold off on repairing the walls until she was satisfied that the new roofing had solved the water problem.

14. On December 30, 2013, Mr. Brown conducted another interior and exterior inspection of the Claimant's home. Mr. Brown observed "mud tunnels" (or "shelter tubes") in the walls of the foyer and family room. (CLAIM #4A and #4B). These mud tunnels are an indication of the presence of termites.

15. The source of the moisture in the Claimant's wall covering and walls was termites, which, for their survival, carry moist soil from the ground up through the structure of a house as they feed on the house's wood framing and other cellulose-based materials.

16. The Claimant's roof did not need to be replaced in December 2013 because the moisture problem was unrelated to the roof.

17. Mr. Brown also concluded in a written report that the roof installed by the Respondent was significantly deficient, with a significant potential for failure. He noted that

edges had been cut unevenly, keyways were misaligned, shingles had been nailed haphazardly, and flashings were improperly configured. (CLAIM #3).

18. In January 2014, the Claimant e-mailed a copy of Mr. Brown's inspection report to the Respondent. The Respondent e-mailed back that he agreed only that one edge of the roof was uneven. He agreed to meet with the Claimant, but later he did not respond to the Claimant's phone calls.

19. The roof installed by the Respondent was significantly deficient, with a significant potential for failure; it had to be replaced.

20. There were at least two places on the roof where an outer shingle or piece of a shingle was missing. The unprotected inner part of the shingle would be subject to failure from exposure to ultra-violet radiation from the sun. (CLAIM #4E and #4F).

21. Some shingles had been inadequately nailed, which would place those shingles at risk of blowing off in a strong wind. (CLAIM #4I).

22. In several places, flashing was missing or improperly configured. Step flashing was not interlaced with shingles that abutted walls or siding. (CLAIM #4G; #4M; and #4N). Counter flashing was applied unevenly. (CLAIM #4L). Missing or improperly configured flashing could lead to water penetration from rain, snow, or ice.

23. Edges of the roof had been cut unevenly and keyways were misaligned. (CLAIM #4C; #4H; and #4J). These two matters are more of an esthetic issue than a functional problem, but the work performed on the edges and the alignment of the keyways does not meet the standard of the roofing industry.

24. On March 12, 2014, the Claimant paid Central Roofing, Siding & Windows Co. \$4,400.00 to remove the roof installed by the Respondent and replace it with a new roof. (CLAIM #5).

25. On November 18, 2014, the Claimant filed a claim with the Fund for reimbursement for an actual loss allegedly suffered as a result of a home improvement contract entered into by the Claimant and the Respondent on October 20, 2013. (FUND #4).

26. On November 20, 2014, the Commission sent the Respondent a copy of the Claimant's claim. (FUND #5).

27. On April 2, 2015, the OAH mailed two Notices of Hearing to the Respondent at 880 Quince Orchard Boulevard, T-2, Gaithersburg, MD 20878, the Respondent's address of record with the Commission, for the hearing on May 14, 2015. One notice was sent by certified, return-receipt mail and the other notice was sent by first-class mail (FUND #1).

28. The USPS returned the certified mailing to the OAH, marked "Refused." (FUND #1). The USPS did not return the first-class mailing to the OAH.

DISCUSSION

The Respondent's Notice of Hearing

The procedures for notice and hearings that apply to proceedings under Title 8, Subtitle 3 of the Business Regulation Article, concerning disciplinary actions against licensed home-improvement contractors, also apply to proceedings to recover from the Fund. Md. Code Ann., Bus. Reg. § 8-407(a) (2015). Section 8-312 of the Business Regulation Article requires the Commission, before it takes any disciplinary action, to give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus. Reg. § 8-312(a) (2015). Specifically, the Commission is required to send a hearing notice to a person against whom the

action is contemplated at least ten days before the hearing by certified mail to the business address on record with the Commission. Md. Code Ann., Bus. Reg. § 8-312(d) (2015). If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter. Md. Code Ann., Bus. Reg. § 8-312(h) (2015).

The Respondent was licensed by the Commission at all times relevant to this case, and he is currently licensed by the Commission. His most recent registration period is from September 5, 2013 through September 5, 2015. On April 2, 2015, the OAH mailed two Notices of Hearing to the Respondent at 880 Quince Orchard Boulevard, T-2, Gaithersburg, MD 20878, the Respondent's address of record with the Commission, for the hearing on May 14, 2015. One notice was sent by certified, return-receipt mail and the other notice was sent by first-class mail. The USPS returned the certified mailing to the OAH, marked "Refused." The USPS did not return the first-class mailing to the OAH.

The Commission clearly complied with the statutory notice requirement, and it was appropriate for me, on behalf of the Commission, to hear and determine the matter in this case. Md. Code Ann., Bus. Reg. §§ 8-312(d) and (h) (2015).

Fund Claim

A home 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). An "'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 (2015). Also, the Commission may deny a claim if it finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

A claimant has the burden of proof at a Fund hearing. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015). In the circumstances presented here, the Claimant has the burden to establish that: (1) the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement; (2) the Claimant had an actual loss due to the costs of restoration, repair, or replacement of the home improvement contract; and (3) the Claimant did not unreasonably reject the Respondent's good faith efforts to resolve the claim. At the hearing, the Fund conceded that the Claimant had established all three elements.

As noted above, on October 2, 2013, Mr. Brown conducted an interior and exterior inspection of the Claimant's home to attempt to discover the cause of moisture that was causing wall covering in the Claimant's foyer and family room to be damp and peeling and cracking. Mr. Brown, as had roofers and siding companies that the Claimant had consulted, found no apparent problems with the Claimant's roof or siding. Subsequently, upon Mr. Brown's recommendation, the Claimant had the Respondent cut a portal into the wall of her family room to further investigate the source of the moisture. The Respondent told the Claimant's husband that there was evidence of water leaking into the wall from the area of the roof, and the Respondent recommended that the Claimant replace the front lower-level portion of her roof.

Between December 5 and 16, 2013, pursuant to an October 20, 2013 contract, the Respondent installed new roofing on the Claimant's home, for which the Claimant paid the Respondent a total of \$4,850.00.

On December 26, 2013, the Respondent cut additional portals into the walls of the Claimant's foyer and family room. On December 30, 2013, Mr. Brown conducted another interior and exterior inspection of the Claimant's home. Through the portals cut by the Respondent, Mr. Brown observed "mud tunnels" in the walls of the foyer and family room, a

clear indication of the presence of termites, and an explanation for the source of the moisture in the Claimant's wall covering and walls. Mr. Brown concluded, as an expert in home inspection, that the Claimant's roof did not need to be replaced in December 2013 because the moisture problem was unrelated to the roof. Mr. Brown also concluded, again as an expert in home inspection, that the roof installed by the Respondent was significantly deficient, with a significant potential for failure, and had to be replaced. There were at least two places where an outer shingle or piece of a shingle was missing. The unprotected inner part of the shingle would be subject to failure from exposure to ultra-violet radiation from the sun. Some shingles had been inadequately nailed, which would place those shingles at risk of blowing off in a strong wind. In several places, flashing was missing or improperly configured. Step flashing was not interlaced with shingles that abutted walls or siding. Counter flashing was applied unevenly. Missing or improperly configured flashing could lead to water penetration from rain, snow, or ice. Edges of the roof had had been cut unevenly and keyways were misaligned. These two matters are more of an esthetic issue than a functional problem, but the work performed on the edges and the alignment of the keyways does not meet the standard of the roofing industry.

In January 2014, the Claimant e-mailed a copy of Mr. Brown's inspection report to the Respondent. The Respondent e-mailed back that he agreed only that one edge of the roof was uneven. He agreed to meet with the Claimant, but later he did not respond to the Claimant's phone calls. The Respondent made no good-faith effort to resolve this claim.

COMAR 09.08.03.03B, which governs the calculation of awards from the Fund, provides, in pertinent part, as follows:

B. Measure of Awards from Guaranty Fund.

...

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant suffered an actual loss as a result of the Respondent's acts and omissions, and that she is entitled to recover \$4,440.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a) and (e) (2015).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Claimant be awarded \$4,400.00 from the Maryland Home Improvement Guaranty Fund; and

ORDER that the Respondent remain 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 Commission, Md. Code Ann., Bus. Reg. § 8-411 (2015); and

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

August 4, 2015
Date Decision Issued

Signature on File

Robert F. Barry
Administrative Law Judge

RB/ac
#156141

(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 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.

(4) The Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.

COMAR 09.08.03.03B.

The Claimant proved and the Fund conceded that the Claimant's actual loss was the \$4,400.00 that she paid to Central Roofing, Siding & Windows Co. to replace the unworkmanlike roof installed by the Respondent. Under 09.08.03.03B(3)(c), the amount of the original contract was \$4,850.00, which is added to the \$4,400.00 that the Claimant paid to replace the roof, for a subtotal of \$9,250.00, from which the amount of the original contract is subtracted, for an award amount of \$4,400.00 Md. Code Ann., Bus. Reg. § 8-405(e)(1) (2015).

PROPOSED ORDER

WHEREFORE, this 1st day of September, 2015, 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