

**IN THE MATTER OF THE CLAIM  
OF JOSEPH MOYHER,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF  
BERTRAM LEBHAR, IV,  
T/A ATLANTIC REMODELING  
CORPORATION,  
RESPONDENT**

**\* BEFORE KATHLEEN A. CHAPMAN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* OAH No.: DLR-HIC-02-17-08817  
\* MHIC No.: 16 (90) 1132  
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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 June 1, 2016, Joseph Moyher (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,843.00 in alleged actual losses suffered as a result of a home improvement contract with Bertram Lebhar, IV, trading as Atlantic Remodeling Corporation (Respondent).

I held a hearing on August 18, 2017 at the Prince George's County Government building in Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).<sup>1</sup> The Claimant represented himself. Eric London, 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.<sup>2</sup>

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (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 the following exhibits on the Claimant's behalf:

Clmt. Ex. 1 – Contract, dated November 19, 2008

Clmt. Ex. 2 – Handwritten notes made by the Claimant detailing various contacts with the Respondent from September 3, 2015 to September 21, 2015

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<sup>1</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

<sup>2</sup> Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on March 29, 2017, COMAR 09.08.03.03A(2), and the certified mailing was returned as unclaimed/undeliverable on April 5, 2017. The regular mail envelope, however, was not returned by the United States Postal Service. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 3 – Invoice from Metro Home Services, dated October 24, 2015; Photocopy of envelope and Return Receipt sent to the Respondent, returned by the United States Postal Service (USPS) on March 20, 2013; handwritten note to “Dino” of Atlantic Remodeling Corporation seeking \$425.00

Clmt. Ex. 4 – MHIC license number for Metro Home Services, expiration date: May 7, 2017

Clmt. Ex. 5 – MHIC Complaint Form, dated March 12, 2016 (filed on March 23, 2016); typewritten complaint, undated

Clmt. Ex. 6 – Handwritten notes made by the Claimant detailing various contacts with the Respondent from January 8, 2014 to August 5, 2015

I did not admit any exhibits on the Respondent’s behalf.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Notice of Hearing, dated March 29, 2017; Certified Mail green card, signed by the Claimant’s wife, dated April 3, 2017; Certified Mail receipt to Respondent, dated August 18, 2017

Fund Ex. 1A – Memo re: undeliverable mail, dated April 5, 2017; Notice of Hearing, dated March 29, 2017 addressed to the Respondent; Hearing Order, dated March 17, 2017; photocopy of envelope addressed to the Respondent; photocopy of Certified Mail receipt to Respondent, dated August 18, 2017

Fund Ex. 2 – Hearing Order, dated March 17, 2017

Fund Ex. 3 – Licensing record, dated July 6, 2017

Fund Ex. 4 – Home Improvement Claim Form, dated May 16, 2016

Fund Ex. 5 – Letter from Joseph Tunney, Chairman, MHIC, to the Respondent, dated June 10, 2016

### Testimony

The Claimant testified in his own behalf.<sup>3</sup> No one appeared or testified on behalf of the Respondent. The Fund did not present any testimony.

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<sup>3</sup> The Claimant’s wife was present for the hearing but did not testify.

## 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 05-120999.
2. On November 19, 2008, the Claimant and his wife entered into a contract with the Respondent to install a roof on the Claimant's property.
3. The contract also included a twenty-five year warranty on material and labor.
4. The contract stated that the work would begin on December 19, 2008 and would be completed by January 20, 2009.
5. The original agreed-upon contract price was \$10,393.00.
6. The parties also entered into a financing agreement, which would have added \$10,516.00 in finance charges to the contract price, for a total of \$20,934.00.<sup>4</sup>
7. On July 14, 2009, the Claimant paid the Respondent in full.<sup>5</sup>
8. From 2009 to May 2014, the roof performed well and showed no defects. However, in June 2014, the Claimant observed water penetrating the interior of his house; specifically, the dining room and kitchen.
9. On or about June 19, 2014, the Claimant called the Respondent to report the roof leak and the Respondent agreed to have someone check the roof.<sup>6</sup>

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<sup>4</sup> The finance agreement added a \$25.00 processing fee to the base contract price causing the amount to be financed to be \$10,418.00. See Clmt. Ex. 1.

<sup>5</sup> The Claimant cancelled the financing agreement and paid the original contract price, which included the \$25.00 processing charge.

<sup>6</sup> The Claimant and his wife took contemporaneous notes on a manila folder detailing their efforts to reach the Respondent and the dates workers came out to the home (*see* Claimant Exhibit 6); however, the sequence of events are unclear and the Claimant's memory was equally unclear. While some of the dates listed in the Findings of Fact may be incorrect, it does not change the overall outcome of this decision.

10. On June 20, 2014, two workers from the Respondent's company arrived at the Claimant's home to investigate the cause of the leak. They discovered that the leak was caused by a defect in the sealant around a satellite dish situated on the roof allowing water to penetrate through the shingles. The Respondent had agreed to remove the satellite dish during the initial installation of the roof, but failed to do so.

11. On June 24, 2015, a worker returned to the Claimant's home and sealed the shingles around the satellite dish on the roof and "put something on the roof to redirect water away from the leaking area." Clmt. Ex. 5.

12. Over the course of several days, more rain fell, causing the roof to leak again.

13. On August 25, 2014, the Claimant spoke with Jim, an employee with the Respondent, explaining that the roof was leaking again. Jim agreed to send a worker to the home to fix the roof.

14. On July 1, 2014, a worker with the Respondent sealed the shingles around the satellite dish on the roof and another worker "patched the kitchen and dining room ceiling." Clmt. Ex. 5.

15. That same evening, it rained again and the roof leaked again.

16. Thereafter, the Claimant "called [the Respondent] over and over again leaving messages trying to get someone to fix the leaking roof."<sup>7</sup> Clmt. Ex. 5.

17. On June 8, 2015, a worker with the Respondent checked the Claimant's attic and roof from the inside of the home. The worker also removed the satellite dish and replaced the shingles in the affected area.

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<sup>7</sup> According to the Claimant's contemporaneous notes, he spoke to several different employees of the Respondent over the course of a year to have someone come out to the home without success. Clmt. Ex. 6

18. On the same date, the worker called Dino,<sup>8</sup> a dry wall manager with the Respondent, to tell him that he finished the job. The worker handed the telephone to the Claimant so that he too may speak to Dino. Dino told the Claimant "to wait for another hard rain and let him know the results." Clmt. Ex. 5.

19. The Claimant noticed no additional leaking from the roof.

20. After many attempts at reaching Dino to discuss the interior damage and leaving several voicemail messages, on September 8, 2015, the Claimant spoke to Dino, who told the Claimant that he was arranging for a contractor to come out to the home to fix the interior damage (kitchen and dining room).

21. When no one appeared at the Claimant's home, on September 21, 2015, the Claimant called and spoke to Dino again, who suggested that the Claimant hire another contractor to perform the interior repairs to the kitchen and dining room because the Respondent was too busy to do the work. The Respondent also agreed to pay the costs associated with the interior repairs and Dino asked the Claimant to send him the bill.

22. On that same date, a worker with the Respondent returned to the home in an attempt to "repair [the] roof/ceiling." Clmt. Ex. 2.

23. On October 24, 2015, Metro Home Services, an MHIC licensed contractor hired by the Claimant, patched a 2' x 2' area in the dining room ceiling with drywall, finished and sanded the drywall, sanded an area on the kitchen ceiling, and primed and painted the affected areas. The cost to do the repairs was \$425.00. The Claimant paid the bill.

24. After multiple attempts to reach Dino by telephone to pay the repair bill, on March 20, 2016, the Claimant sent the Metro Home Services invoice to the Respondent via

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<sup>8</sup> The Claimant did not recall Dino's last name.

certified mail return receipt. The United States Postal Service returned the envelope as unable to forward.

25. On or about March 2016, the Claimant drove by the Respondent's place of business and discovered that the company went out of business.

26. On March 23, 2016, the Claimant filed a Complaint Form with the MHIC seeking reimbursement for the repair bill from Metro Home Services in the amount of \$425.00 and restitution for the loss of the twenty-five year warranty.<sup>9</sup>

27. The roof repair was a success and the roof is no longer leaking.

28. The interior damage was consequential to the roof leaking.

29. The Respondent's promise to pay for the interior repairs was not an addendum to the original contract.

30. There was no consideration between the parties concerning the Respondent's agreement to pay for the costs associated with the interior repair.

31. The Claimant's actual loss is zero.

### 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).<sup>10</sup> "[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.*

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<sup>9</sup> On the Home Improvement Claim Form, the Claimant sought \$10,843.00 from the Fund but at the hearing, he explained that he was only seeking reimbursement for the interior repairs and some redress for the loss of the warranty.

<sup>10</sup> As noted above, "COMAR" refers to the Code of Maryland Regulations.

*Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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); *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 not proven eligibility for compensation.

The salient facts in this case are not in dispute. The original home improvement project at the Claimant’s home was for the installation of a roof. The contract also included a twenty-five year warranty on labor and material. At some point in 2014, the roof began to leak causing interior damage inside the Claimant’s home. The Claimant reached out to the Respondent to repair both the roof leak and the interior damage. After several attempts at fixing the leak by sealing or redirecting the water, the Respondent finally removed a satellite dish, installed new shingles on the roof, and sealed the affected area. According to the Claimant, the roof did not leak after that. Therefore, I find that the Claimant failed to show that he suffered any actual loss stemming from the roof installation.

The purpose for filing a claim, as the Claimant confirmed during his testimony, was not for unworkmanlike, inadequate or incomplete work on the roof but for the damage caused to his dining room and kitchen from the leaking roof. At the suggestion of the Respondent, the Claimant hired another MHIC-licensed contractor to repair the interior damage in the dining room and kitchen. The Respondent communicated verbally to the Claimant that he will pay the



costs associated with the repair. The Claimant sent the bill to the Respondent for reimbursement, but the Respondent never paid the bill.<sup>11</sup> Under these circumstances, I also find that this case does not involve actual loss as defined by section 8-401.

Contractual agreement

The Claimant asserts that he is entitled to an award from the Fund because the Respondent verbally agreed to pay for the interior repairs to his home and failed to do so. Concurring with the Claimant, the Fund suggested that the verbal agreement was “an addendum” to the original contract signed in 2008 and the failure to follow through on that verbal agreement amounts to an act or omission by the Respondent. The Fund also suggested that the verbal agreement was a “promise made beyond the contract,” and was compensable because the Respondent agreed to pay for the repairs.

A home improvement contract is defined as “an oral or written agreement between a contractor and owner for the contractor to perform a home improvement.” Md. Code Ann., Bus. Reg. § 8-101(h). Thus, in order for there to have been an actual loss in this case, there first must be a home improvement contract.

The touchstone of contract interpretation is the intent of the parties. [Internal citations omitted]. “Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.”

*Labor Ready v. Abis*, 137 Md. App. 116, 127 (2001) (citing *Berg v. Hudesman*, 801 P.2d 222, 228 (1990)). Moreover, in order for there to be a valid contract: (1) the parties must be competent to contract, (2) the contract must be for a proper or lawful subject matter, (3) there must be consideration and mutuality of agreement or assent, and (4) mutuality of obligation. In

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<sup>11</sup> By the time the Claimant sent the bill to the Respondent, the Respondent was out of business.

addition to offer and acceptance, there must be consideration. *Beall v. Beall*, 291 Md. 224 (1981); *WILLISTON ON CONTRACTS* § 3:2 (4th ed. 2001). Without consideration, there is no contract. *Beall*, 291 Md. at 229.

The contract in question which the Claimant believes holds the Respondent accountable for the interior repairs is the November 19, 2008 home improvement contract wherein the Claimant agreed to pay the Respondent \$10,418.00 for the installation of a roof on the Claimant's property. Clearly, the subject matter and objective of the contract was to install a roof. While it is true that the contract also contained a twenty-five year warranty, the Claimant testified and wrote that the warranty was for material (shingles) and labor only.<sup>12</sup> The warranty offered no caveats that should the roof fail the Respondent would also agree to repair or pay for consequential damages. As such, I find that any subsequent act by the Respondent, made six years later, to agree to pay for any consequential damages due to a leaky roof, is far removed from the original intent of the contract. Therefore, the Claimant failed to present any credible evidence to show that there was a contractual agreement between him and the Respondent to cover the costs for interior damage, because there was no consideration.

#### Consequential damages

Assuming *arguendo* that there is a contract, a claim against the Fund has limitations. A claim against the Fund for an actual loss cannot include consequential damages. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1)(a). Although neither the statute nor the regulations governing the Fund define "consequential damages," the law provides that an award from the Fund is allowable only to reimburse a homeowner for the cost of "restoration, repair, replacement, or completion" of a substandard or unfinished home improvement job. Md. Code

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<sup>12</sup> "My wife and I signed a contract with [the Respondent]...on November 1, 2008 for a new roof with a guarantee of 25 years on the shingles." Clmt. Ex. 5.

Ann., Bus. Reg. § 8-401. Consequential damages are damages stemming from problems that arise as a consequence of poor performance and not the poor performance itself. *See generally CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 411–13 (2012).

Here, the Claimant is not seeking reimbursement from the Fund to restore, repair, replace or complete the roof; instead, the Claimant is seeking monies from the Fund to cover the cost of repairing the paint and drywall that was damaged by the roof leak. These are damages that arose as a consequence of the Respondent's poor performance in initially installing the roof. For there to be a compensable claim, it is presumed that the contractor either directly or indirectly performed a home improvement. *See generally* Md. Code Ann., Bus. Reg. § 8-101(g)(3)(iv). The Respondent did not perform any work on the interior of the home per the original contract. Therefore, the cost to repair the interior of the home must be borne by the Claimant and not by the Fund.

#### Warranty

Lastly, the Claimant argues that he is due restitution for the loss of the twenty-five year warranty. The Claimant bases his contention on the fact that the Respondent is now out of business and unable to honor the warranty. The Fund, however, disagreed and recommended against reimbursement on the basis that the Claimant failed to establish that the roof is currently compromised or in need of replacement. In other words, the Claimant has not established an actual loss. The Fund also points out that should that occur, the Claimant is free to repeat the process of filing for a Claim against the Fund. I agree. As noted above, the definition of 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. A warranty does not fit that definition.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-101, 8-401, 8-405 (2015); COMAR 09.08.03.03B(1)(a); *Labor Ready v. Abis*, 137 Md. App. 116 (2001); *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387 (2012).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

**Signature on File**

September 22, 2017  
Date Proposed Decision Issued

C  
Kathleen A. Chapman /  
Administrative Law Judge

KAC/da  
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