

CLAIM OF ESTATE OF CECILIA	* BEFORE MARLEEN B. MILLER,
BOARMAN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-25934
FOR THE ALLEGED ACTS OR	* MHIC NO.: 09 (90) 102
OMISSIONS OF MARK D. POOLE,	*
T/A DECK & SIDING CATERERS LLC,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On July 21, 2009, Cecilia Boarman (the Claimant) filed a claim with the Maryland Home Improvement Commission (the MHIC or the Commission) Guaranty Fund (the Fund),¹ for reimbursement of the actual losses she allegedly suffered as a result of the acts and omissions of Mark D. Poole t/a Deck & Siding Caterers LLC (the Respondent). After investigation, the

¹ The Claimant died on January 22, 2010. *See* Cl. #1. Ann Minsky, the Claimant’s oldest daughter, is the personal representative of the Claimant’s estate. Ms. Minsky appeared at the hearing on behalf of the Claimant’s estate and submitted documentation to support her status. *Id.* The Fund allowed Ms. Minsky to amend the Claimant’s Fund claim to substitute the Estate of Cecilia Boarman for the Claimant, and I granted the amendment, as it was supported by documentation and statute. *See* Fund #8; Md. Code Ann., Bus. Reg. § 8-101(k) (2010).

Commission issued an April 4, 2012 Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) the following day.

On June 18, 2013, I conducted a hearing at OAH's Administrative Law Building in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Assistant Attorney General Peter Martin appeared on the Fund's behalf, and Ann Minsky, Personal Representative for the Claimant's Estate, appeared on the Claimant's behalf. As addressed in footnote 1, *supra*, the claim was amended to substitute the Claimant's estate for the Claimant.

Despite adequate notice from OAH, neither the Respondent nor anyone acting on his behalf appeared at the hearing or requested a postponement. Accordingly, I conducted the hearing in the Respondent's absence. *See id.* § 8-312(h) (Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.02.09.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01, and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions and, if so, what amount is the Claimant entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. January 27, 2010 Letters of Administration from the Baltimore County Register of Wills to Ann Minsky, with attached copy of Claimant's January 22, 2010 Certificate of Death
2. The Claimant's July 12, 2007 contract with the Respondent
3. July 13, 2007 copy of check from the Claimant to the Respondent in the amount of \$2,500.00; July 27, 2007 copy of check from the Claimant to the Respondent in the amount of \$4,000.00; August 6, 2007 copy of check from the Claimant to the Respondent in the amount of \$3,000.00.
4. October 31, 2007 letter from Earl Cook, Verizon Repair Service, to the Claimant
5. July 18, 2010 roofing proposal from S&K Roofing to the Claimant's estate
6. April 27, 2010 roofing proposal from Tri-County Roofing & Sheet Metal, Inc. to Amy Frederick, the Claimant's daughter
7. Letter from Clayton Cunningham, "A" Company Home Improvements, to the Claimant, with attached May 18, 2009 proposal
8. November 24, 2009 letter from Rick M. Grams, Esquire, to the Claimant
9. The Claimant's Draft Complaint against the Respondent in the Circuit Court of Maryland for Baltimore County
10. The Claimant's handwritten summary of her claim
11. July 14, 2008 letter from the Claimant, with attached handwritten summary of complaint against the Respondent
12. March 11, 2010 letter from Dorian S. St. Martin, M.D.
- 13A-L Photographs of the Claimant's property
- 14A-L Photographs of the Claimant's property

The Fund submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. August 10, 2012 Notice of Hearing, with attached April 4, 2012 Hearing Order
2. October 31, 2012 Notice of Hearing

3. February 7, 2013 Notice of Hearing, with attached certified mail envelope undeliverable to the Respondent
4. June 5, 2013 letter from Steven Smitson, Executive Director, MHIC, regarding the Respondent's licensing history
5. May 31, 2013 Affidavit of William Banks, Jr., MHIC Investigator, regarding the Respondent's address on record with MVA
6. MHIC I.D. Registration of Respondent, printed May 29, 2013
7. The Claimant's July 21, 2009 claim
8. The Claimant's March 22, 2010 amended claim
9. Maryland Department of Assessments and Taxation Real Property Search, printed June 6, 2013
10. MHIC I.D. Registration of Clayton Cunningham, printed May 30, 2013

The Respondent, having failed to appear, submitted no documents for admission into evidence.

Testimony

Ms. Minsky, the Claimant's Personal Representative, testified on behalf of the Claimant's estate and also presented the testimony of Amy Wainwright Frederick, the Claimant's younger daughter. The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent has been a licensed home improvement contractor, License # 01-80054.
2. At all relevant times, the Claimant owned property at 7125 Fairbrook Road in Baltimore, Maryland (the Property).

3. On July 12, 2007, the Claimant entered into a contract (the Contract) with the Respondent for the following work (the Work) to be performed on the Property at a cost of \$9,500.00:

- Repair front roof and fix bad spots
- Replace any vent caps where needed
- Install and provide new shingles for back roof
- Remove all trash from contractors
- Install new rubber flashing caps
- Install remainder of fence (owner to provide)
- Install gutters
- Repair garage ceiling
- Fix work not finished by Bernard Cary²

4. The Claimant paid to the Respondent the entire \$9,500.00 due under the Contract in the following manner: on July 13, 2007, the Claimant paid the Respondent \$2,500.00; on July 27, 2007, the Claimant paid the Respondent \$4,000.00; on August 6, 2007 the Claimant paid the Respondent the \$3,000.00 balance due under the Contract.

5. The Respondent commenced the Work on or about July 15, 2007 and completed the following on or about August 6, 2007:

- Knocked out garage ceiling and put up dry wall
- Installed fence
- Installed gutter

² The Claimant added this term to the contract. Bernard Cary was an unlicensed contractor, who the Claimant had previously hired to replace her roof. Instead of removing and replacing the Claimant's roof shingles, Mr. Cary put shingles on top of the older shingles. The original contract price was \$6,500.00, but, in consideration for the double layer of shingles to be removed, the roof repaired, and new shingles installed, the Claimant and the Respondent agreed to a modified contract price of \$9,500.00.

➤ Removed trash

6. The Respondent's Work was inadequate/incomplete/unworkmanlike in the following respects:

➤ The shingles were not removed and replaced

➤ The holes in the roof were not repaired

➤ The gutters were installed in separate pieces and were not attached securely, leaving large gaps between the house and gutters

➤ The vent caps and rubber flash caps were not replaced

➤ The fence posts were not set in concrete, and the fence was crooked and did not meet the ground

Because of the deficiencies in the Respondent's Work, water leaked into the house and kitchen, creating mold in the front of the house and garage and damaging the drywall and insulation in the garage ceiling. The fence was unstable.

7. On or about August 6, 2007, the Claimant pointed out the problems with the Work, and the Respondent said that he was busy and would return on a weekend. The Claimant called and wrote the Respondent a number of times, but the Respondent did not return to correct the problems.

8. There is no value to the Respondent's Work. *See* Cl. #7.

9. On July 21, 2009, the Claimant filed her Claim against the Fund.

10. On or about November 24, 2009, the Claimant hired an attorney to file a complaint in the Baltimore County Circuit Court against the Respondent. The attorney drafted a complaint, but the Claimant did not file it because the Respondent had declared bankruptcy.

11. On January 22, 2010, the Claimant died of atherosclerotic cardiovascular disease.

12. On March 22, 2010, the Claimant's personal representative filed an amended Claim against the Fund, substituting the Claimant's estate for the Claimant.

13. On April 14, 2011, the Respondent's license was suspended, and the Respondent remains unlicensed.

14. On January 14, 2013, the Property reverted to the Claimant's mortgage company.

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that she incurred an actual loss, which resulted from a licensed contractor's acts or omissions. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." For the reasons set forth below, I conclude that the Claimant's estate has met this burden, by proving that the Respondent failed to properly perform the Work required under the Contract and that the Claimant incurred an actual loss entitling her to an award of \$9,500.00.

The Fund presented conclusive evidence that the Respondent was at all relevant times a licensed home improvement contractor. The Claimant's personal representative testified and presented documentation establishing the Contract terms, the Claimant's payments to the Respondent, and the Respondent's failure to properly complete the agreed-upon Work under the Contract. The Respondent undertook no work on the Claimant's roof, and the Respondent's installation of the gutters and fence was inadequate, incomplete, and unworkmanlike. The gutter was poorly secured and leaked water, and the fence was crooked and unstable. The Respondent's poor and incomplete workmanship created mold in the Property and damaged the drywall and

insulation in the garage ceiling. The Claimant's photographs of the Respondent's Work clearly show its deficiencies to any layman, so no expert was required to testify.

The Respondent did not appear at the hearing to place any of the Claimant's evidence in dispute, and the Fund's representative acknowledged that the evidence, including the letter from Clayton Cunningham, an experienced and respected contractor, clearly established that the Respondent's Work had no value and that the Claimant's estate is entitled to an award from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). A unique measurement may be applied if none of those formulas is appropriate. *Id.* The Fund submitted that none of the formulas is applicable and that a unique and easy measurement should be applied, which is the amount the Claimant paid under the Contract. I agree that the Claimant's actual loss is the Contract price of \$9,500.00, but I also find that the following formula set forth in COMAR 09.08.03.03B(3)(b) is applicable:

B. Measure of Awards from Guaranty Fund.

....

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

....

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

Applying this formula, I calculate the Claimant's actual loss as follows:

\$9,500.00	Amount the Claimant paid the Respondent
+ \$0.00	Value of materials or services provided by the Respondent
\$9,500.00	The Claimant's actual loss

Accordingly, I recommend that the Fund award \$9,500.00 to the Claimant's estate. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (Supp. 2012).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant has met its burden of proving that the decedent incurred an actual loss as a result of the Respondent's inadequate and unworkmanlike performance of Work to be performed under the Contract. Bus. Reg. §§ 8-405(a), 8-407(e)(1) (2010 & Supp. 2012). The total recoverable amount of that loss is \$9,500.00, which the Claimant's estate should be awarded from the Fund. Bus. Reg. § 8-405(e)(5) (Supp. 2012); COMAR 09.08.03.03B(3)(b).

RECOMMENDED ORDER

Upon due consideration, I **RECOMMEND** as follows:

1. The MHIC **ORDER** that Ann Minsky, as personal representative of the Claimant's estate, be awarded \$9,500.00 from the MHIC Fund, for the actual losses the Claimant sustained as a result of the Respondent's inadequate and unworkmanlike performance of agreed-upon home improvement work;
2. The Respondent, Mark D. Poole, t/a Deck & Siding Caterers LLC, continue to be ineligible for an MHIC license, under Business Regulation Article § 8-411(a), until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent; and


3. The records and publications of the MHIC reflect this decision.

September 9, 2013

Date

MBM/lh
#144821

Signature on File


Marleen B. Miller
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 23rd day of October 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

Andrew Snyder

*Andrew Snyder
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION