

IN THE MATTER OF THE CLAIM	* BEFORE JOHN T. HENDERSON, JR.,
OF CATHERINE SCHULER,	* ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	* OAH NO.: DLR-HIC-02-16-19296
JACK WALKER, T/A	* MHIC NO.: 15 (90) 1155
HOME PRO ROOFING &	*
REMODELING, LLC	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED 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 March 15, 2016, Catherine Schuler (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the reimbursement of \$4,019.00 of actual losses allegedly suffered because of a home improvement contract with Jack Walker, t/a Home Pro Roofing and Remodeling, LLC (Respondent).

I held a hearing on November 18, 2016, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue, Suite 208, Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(a) and (e) (2015 ). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimant appeared and represented herself. The Respondent did not appear.

On July 25, 2016, the OAH mailed notice of the hearing to the Respondent by certified and regular mail to 2144 Priest Bridge Court, No. 7, Crofton, Maryland 21114, his last known address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2015).<sup>1</sup> The notice advised the Respondent of the time, place, and date of the hearing. On or about August 3, 2016, the United States Postal Service (USPS) returned the mail addressed to the Respondent as being not deliverable as addressed. On September 27, 2016, a second notice was mailed to the Respondent at the same address of record and an alternate address of 407 Craney Creek Road, Stevensville, Maryland 21666. On or about September 30, 2016, the USPS returned the mail addressed to the Respondent at the address of record as being unable to forward due to the Respondent having moved and leaving no forwarding address. On or about October 5, 2016, the USPS returned the mail addressed to the Respondent at the alternate address as the address being vacant. The USPS was unable to forward the mail.

Since the notice of the hearing was sent to the Respondent at his addresses of record with the MHIC and an alternate address within the required time, and no forwarding order or other correspondence from the Respondent was provided to identify other alternative addresses, I determined that the Respondent was properly notified but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence.

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<sup>1</sup> "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2015).

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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 09.08.02; COMAR 28.02.01.

### **ISSUES**

1. Did the Claimant sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?
2. If so, how much is the Claimant entitled to receive from the Fund?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted exhibits on behalf of the Claimant as follows:

- Cl. Ex. 1: Eleven photographs of the property construction
- Cl. Ex. 2: Proposal and contract dated September 9, 2014 and October 27, 2014
- Cl. Ex. 3: Claimant's MasterCard statements dated October 20, 2014 and December 19, 2014 .
- Cl. Ex. 4: Proposal from Jay Home Specialist, Inc., dated September 22, 2016; proposal from Thompson Creek Window Company (Thompson Creek), dated February 11, 2016; Servicing Agreement from Thompson Creek, dated February 11, 2016
- Cl. Ex. 5: Copy from Respondent's website
- Cl. Ex. 6: Respondent's response to complaint, dated December 11, 2014
- Cl. Ex. 7: Claimant's written review, dated November 22, 2015; copies from Respondent's web page
- Cl. Ex. 8: Claimant's complaint filed with Angie's List, dated November 29, 2014; Claimant's complaint filed with Montgomery County's Office of Consumer Protection (MCOCP), dated December 17, 2014; letter to MCOCP from the Claimant, dated December 20, 2014; email from Respondent to Claimant, dated January 16, 2015; letter from the Respondent to the MCOCP, undated; Claimant's response to Respondent, dated January 22, 2015; letter to DLLR from the Claimant, dated May 11, 2015

I admitted exhibits on behalf of the Fund as follows:

- GF Ex. 1: Memo from OAH, dated August 17, 2016, and mail addressed to the Respondent (Notice of Hearing, dated July 25, 2016, and Hearing Order from HIC, dated June 17, 2016) and returned by the USPS as unable to forward
- GF Ex. 2: Memo from OAH, dated August 5, 2016, and mail addressed to the Respondent (Notice of Hearing, dated July 25, 2016, and Hearing Order from HIC, dated June 17, 2016) and returned by the USPS as unable to forward
- GF Ex. 3: Maryland Motor Vehicle Administration Driving Record for the Respondent
- GF Ex. 4: Respondent's DLLR license history, as of September 6, 2016
- GF Ex. 5: Letter from MHIC to the Respondent, dated March 17, 2016; MHIC Home Improvement Claim Form, dated March 15, 2016

Testimony

The Claimant testified on her own behalf. She did not call any other witnesses.

The Fund did not present any witness testimony.

**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 contractor's license number 102337 and was trading as Home Pro Roofing and Remodeling, LLC.
2. The Claimant is not related to the Respondent.
3. The Claimant's home subject to this matter is located at 10201 Proctor Street, Silver Spring, Maryland (the Home).
4. The Home is used as the Claimant's primary residence.
5. The Claimant has not filed other claims against the Respondent outside of these proceedings.

6. On September 9, 2014, the Claimant and Respondent entered into an agreement whereby the Claimant would pay the Respondent \$15,411.00, to replace her roof and siding.

The scope of work agreed upon is summarized as follows:

- Remove all aluminum siding to include all soffit, fascia and rake metal
- Remove existing gutters, but do not damage as they will be re-installed
- Install house wrap on entire house
- Install siding, trim boards along roofline, rakes around all windows and flashing, all horizontal trim boards and tape
- Wrap all rake and fascia boards with smooth white aluminum to include wrapping of five windows;
- Install fully vented white soffit on all overhangs/eaves
- Install rectangle white functional gable vents
- Install three trim blocks for lights

7. October 27, 2014, the Claimant and Respondent entered into a second agreement whereby the Claimant would pay the Respondent \$2,700.00 to do, in summary, the following additional home improvements:

- Pressure wash all brick on home, front porch and shed
- Paint brick on entire house except on rear porch where back is white; paint front porch and steps; paint aluminum box chimney; paint vent cover on right side of house

8. The total agreed upon fee for both contracts totaled \$18,111.00.
9. On September 10, 2014, the Claimant paid the Respondent \$5,137.00.
10. On October 27, 2014, the Claimant paid the Respondent \$11,174.00
11. The Respondent deducted \$389.00 from the fee because the Appellant decided she did not like the color of paint she selected for the brick.
12. On November 6, 2014, the Claimant paid the Respondent \$1,400.00.
13. The Claimant paid the Respondent a total of \$17,711.00 for the Home improvement work.
14. The Respondent completed all of the work agreed upon pursuant to the contracts of September 9, 2014 and October 27, 2014.

15. The Respondent incorrectly reinstalled the gutters across the front of the Home.

16. On February 11, 2016, Thompson Creek provided the Claimant with a proposal to replace the front gutters and three downspouts on the Home for the sum of \$694.00.

### DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015).<sup>2</sup> Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full, with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411.

Recovery against the Fund is based on “actual loss,” as defined by statute and regulation. “[A]ctual 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.

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<sup>2</sup> Unless otherwise indicated, all references are to the 2015 version.

§ 8-401. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3). “[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. Police Dep’t.*, 369 Md. 108, 125, n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000).

First, there is no dispute that the Respondent held a valid contractor’s license in 2014 when he entered into the contracts with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). Second, there is also no dispute that the Claimant is the owner of the Home and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement due to misconduct, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

For the following reasons, I find that the Claimant has proven eligibility for compensation, but only due to the Respondent incorrectly reinstalling the rain gutters along the front of the Home.

On September 9, 2014, the Respondent contracted with the Claimant to replace the Home's roof and siding. In addition, the October 27, 2014 contract required the Respondent to pressure wash and paint certain brick areas of the Home. The Claimant's claim sought \$4,019.00 from the fund. The only credible evidence the Claimant provided showing the Respondent's misconduct, which led to an inadequate home improvement, concerned the Respondent's incorrect reinstallation of the gutters.

The evidence provided by the Claimant showed that the Respondent incorrectly replaced the rain gutter along the front of the Home and did not correct the problem when the Claimant requested that he do so. The Claimant submitted a proposal from Thompson Creek, where that company agreed that it would properly replace the front gutters and three downspouts on the Home for the sum of \$694.00.

The Claimant did not provide any credible evidence that there were errors in the roof and siding replacement. The evidence shows that the work performed by the Respondent in replacing the roof and siding was conducted in a workmanlike and adequate manner. The Complainant, in fact, testified that she was satisfied with that work.

Most of the Claimant's testimony concerned her dissatisfaction with the Respondent's paintwork. Although the Claimant was involved in deciding the paint color for the brick to be painted on her home, she became dissatisfied with the color when the brick was painted. Further, she testified that the Respondent's paintwork was sloppy. She testified that the Respondent's painters left the job site without cleaning up, that her lawn was covered in paint and that there were paint smears all over the windowsills, railings, and downspouts.

The eleven photographs the Claimant submitted into evidence (CL. Ex. 1) do not depict egregious painting errors but nuisance cosmetic problems. For example, photograph number two shows that a small area of the white gutter bracket had green paint on the bottom of the bracket.



The green paint was the color painted on the brick under the gutter. Photograph three showed green paint upon what appears to be cable wire lying against the brick. Photograph six shows green paint misapplied at the bottom area of the hand railing to the painted steps. Photograph ten shows green paint drops upon the white windowsill. Photograph eleven shows green paint spilled upon a slate walkway within the yard.

Although I might agree that the paint droppings, splatters and spilling are cosmetic nuisances, they are consequential to the work performed by the Respondent. Neither contract of September 9, 2014 and October 27, 2014 provided that the Respondent would be responsible for any cleanup of spilled paint. The Respondent was required to paint the agreed upon areas in a workmanlike manner. According to the Claimant, her only complaint about the painting was the color that she disliked and the spillage or drops. Due to her complaints, the Respondent gave the Claimant a credit of \$384.00 because of her dissatisfaction with the paint color.

The Fund argued that the Claimant's dissatisfaction with the painting as described is not compensable by the Fund, as the droppings, splatters and dripping of paint, it argued, were consequential damages at best. The Fund further argued that there was no contractual obligation requiring the Respondent to clean up paint droppings, splatters or paint drippings.

The case of *Simard v. Burson*, 197 Md. App. 396 (2011), *aff'd*, 424 Md. 318 (2012), provided a definition of consequential damages, as follows:

Consequential damages cover those losses suffered by the non-breaching party other than the loss in value of the other party's performance. Restatement (Second) of Contracts § 347 (1981). Such damages must be "reasonably foreseeable" and must "fairly and reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Hoang*, 177 Md. App. at 594-95, 936 A.2d 915 (quoting *Winslow Elevator & Mach. Co. v. Hoffman*, 107 Md. 621, 635, 69 A. 394 (1908)). Not all damages that are "reasonably foreseeable," however, may be recovered as consequential damages; like general damages, consequential damages must be "*caused by the breach*" of contract. Restatement (Second) of Contracts § 347(b) (1981) (emphasis added). In other words, the losses claimed by the non-breaching party must have "actually resulted from the breach." *See*,

*e.g., Hoang*, 177 Md. App. at 594, 936 A.2d 915; *MLT Enters. v. Miller*, 115 Md. App. 661, 674, 694 A.2d 497 (1997) (“Under both tort and contract law, one claiming damages must prove that tortious act or breach of contract was the proximate cause of the damages claimed.”).

Spilled paint, drips and splatters are reasonably foreseeable when painting a home exterior. Thus, such results are consequential damages and are not compensable by the Fund as they are not “actual damages.”

The Fund did agree that since the Claimant needs to re-install the gutters that were incorrectly installed by the Respondent, the re-installation is compensable in the sum of \$694.00 pursuant to the Thompson Creek Proposal. The Fund recommended that the Claimant be awarded \$694.00 if I find an actual loss.

There is no dispute between the Claimant and the Respondent as to the scope of the work performed pursuant to the September 9, 2014 and October 27, 2014 contracts. The Respondent completed the work. The Claimant paid him the agreed upon sum of \$17,711.00.

I do find that pursuant to the incorrect gutter reinstallation, the Respondent did not perform that home improvement work in a workmanlike manner for which he was contracted. As a result, the Claimant sustained an actual monetary loss. Having found eligibility for compensation for the incorrect gutter reinstallation, I now turn to the amount of the award, if any.

The Fund may not compensate a claimant 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) sets forth the various formulas for determining an “actual loss.” I find the appropriate formula to be the following:

(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.

Therefore, I will evaluate the instant claim of an "actual loss" for the incorrect installation of the gutters in accordance with COMAR 09.08.03.03B(3)(c). In order to determine the Claimant's actual loss from the evidence in this record, the following calculations apply:

\$ 17,711.00	Payments made to the Respondent by Claimant
\$ <u>694.00</u>	Cost to repair, replace, or complete the gutter installation
\$ 18,405.00	(Expenditure Subtotal)
<\$ <u>17,711.00</u> >	Less the original contract price
\$ 694.00	Actual Loss

The Claimant has an "actual loss" of \$694.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a).

#### **PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual loss of \$694.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) (2015); COMAR 09.08.03.03B(3)(c).

#### **RECOMMENDED ORDER**

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

**ORDER** that the Claimant sustained an actual loss; and


**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$694.00; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2015); and

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

**Signature on File**

January 30, 2017  
Date Issued

  
John T. Henderson, Jr.  
Administrative Law Judge

JTH/emh  
#166406

**PROPOSED ORDER**

***WHEREFORE, this 8<sup>th</sup> day of March, 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**